PROCEEDINGS

OF THE

American Society of International Law

AT ITS

FOURTH ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

APRIL 28-30, 1910

NEW YORK CITY
1910

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SATURDAY, APRIL 30, 1910.

Morning Session.

Afternoon Session.

CONSTITUTION

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW[1]

ARTICLE I.

Name.

This Society shall be known as the AMERICAN SOCIETY OF INTERNATIONAL LAW.

ARTICLE II.

Object.

The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will cooperate with other societies in this and other countries having the same object.

ARTICLE III.

Membership.

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including

[1] NOTE. — The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting, at page 23.

The Constitution was adopted January 12, 1906.

a copy of the publications issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause which this Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

ARTICLE IV.

Officers.

The officers of the Society shall consist of a President,[2] nine or more Vice-Presidents, the number to be fixed from time to time by the Executive Council, a Recording Secretary, a Corresponding Secretary and a Treasurer, who shall be elected annually, and of an Executive Council composed of the President, the Vice-Presidents, *ex-officio,* and twenty-four elected members, whose term of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen.

The Recording Secretary, the Corresponding Secretary and the Treasurer shall be elected by the Executive Council from among its members. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all the offices to be filled by the Society at such election shall be placed in nomination by a

[2] See *Amendments*, article 1, p. 9.

Nominating Committee of five members of the Society previously appointed by the Executive Council, except that the officers of the first year shall be nominated by a committee of three appointed by the Chairman of the meeting at which this Constitution shall be adopted.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

ARTICLE V.

Duties of Officers.

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council.

2. The Secretaries shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to them.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programmes therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

ARTICLE VI.

Meetings.

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

ARTICLE VII.

Resolutions.

All resolutions which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

ARTICLE VIII.

Amendments.

This Constitution may be amended at any annual or special meeting of the Society by a majority vote of the members present and voting. But all amendments to be proposed at any meeting shall first be referred to the Executive Council for consideration and shall be submitted to the members of the Society at least ten days before such meeting.

Amendments.

ARTICLE I.[3]

Article VI is hereby amended by inserting after the words "The officers of the Society shall consist of a President," the words "an Honorary President."

[3] This amendment was adopted at the business meeting, held April 24, 1909

OFFICERS

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

FOR THE YEAR 1910–11

HONORARY PRESIDENT

HON. WILLIAM H. TAFT

PRESIDENT

HON. ELIHU ROOT

VICE-PRESIDENTS

CHIEF JUSTICE FULLER[1]
JUSTICE WILLIAM R. DAY
HON. P. C. KNOX
HON. ANDREW CARNEGIE
HON. JOSEPH H. CHOATE
HON. JOHN W. FOSTER
HON. GEORGE GRAY
HON. JOHN W. GRIGGS
HON. WILLIAM W. MORROW
HON. RICHARD OLNEY
HON. HORACE PORTER
HON. OSCAR S. STRAUS
HON. SHELBY M. CULLOM
HON. JACOB M. DICKINSON

EXECUTIVE COUNCIL

TO SERVE UNTIL 1911

Hon. Richard Bartholdt, Missouri
Gen. George B. Davis, District of Columbia
Prof. Charles Noble Gregory, Iowa
Hon. A. J. Montague, Virginia
Rear-Admiral Charles H. Stockton, District of Columbia
Charles B. Warren, Esq., Michigan
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Prof. Theodore S. Woolsey, Connecticut

TO SERVE UNTIL 1912

Chandler P. Anderson, Esq., New York
Charles Henry Butler, Esq., District of Columbia
Prof. George W. Kirchwey, New York
Robert Lansing, Esq., New York
Prof. John Bassett Moore, New York
Jackson H. Ralston, Esq., District of Columbia
Prof. James Brown Scott, District of Columbia
Prof. George G. Wilson, Rhode Island

TO SERVE UNTIL 1913

Hon. James B. Angell, Michigan
Hon. Augustus O. Bacon, Georgia
Hon. Frank C. Partridge, Vermont
Prof. Leo S. Rowe, Pennsylvania
F. R. Coudert, Esq., New York
Everett P. Wheeler, Esq., New York
Hon. Edwin Denby, Michigan
Alpheus H. Snow, Esq., District of Columbia

[1] Deceased.

EXECUTIVE COMMITTEE

HON. ELIHU ROOT
HON. GEORGE GRAY
PROF. GEORGE W. KIRCHWEY
ROBERT LANSING, ESQ.
PROF. JOHN BASSETT MOORE
PROF. GEORGE G. WILSON
HON. OSCAR S. STRAUS

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JAMES BROWN SCOTT, RECORDING SECRETARY
CHARLES HENRY BUTLER, CORRESPONDING SECRETARY
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COMMITTEES

Standing Committee for selection of Honorary Members: George G. Wilson, *Chairman*, Jackson H. Ralston, Theodore S. Woolsey.

Standing Committee on Increase of Membership: James Brown Scott, *Chairman*, Charles Cheney Hyde, John H. Latané, Jesse S. Reeves, Theodore S. Woolsey.

Auditing Committee: Everett P. Wheeler, William Dulles.

Committee on Codification:[1] Elihu Root, *Chairman, ex officio*, Chandler P. Anderson, Charles Henry Butler, Charles Noble Gregory, Robert Lansing, Paul S. Reinsch, Leo S. Rowe, James Brown Scott, George G. Wilson.

Committee on Publication of the Proceedings of the Fourth Annual Meeting: George A. Finch, Henry G. Crocker.

Committee on Fifth Annual Meeting: James Brown Scott, *Chairman*, Charles Noble Gregory, Amos S. Hershey, Thomas Raeburn White, W. W. Willoughby.

[1] At a meeting of the Committee on Codification, held November 15, 1909, the following sub-committees were appointed:

Sub-committee Upon Scope and Plan of the Report: Robert Lansing, *Chairman*, Chandler P. Anderson, Charles Henry Butler, Leo S. Rowe.

Sub-committee Upon the History and Status of Codification: James Brown Scott, *Chairman*, Charles Noble Gregory, Paul S. Reinsch, George G. Wilson.

FOURTH ANNUAL MEETING

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

PROGRAM

THURSDAY, APRIL 28, 1910

At eight o'clock p. m.

PRESIDENT'S ADDRESS: The Basis of Protection to Citizens Residing Abroad.
Topic: The Codification of International Law.
Speakers: HON. CHARLES NAGEL, PROF. PAUL S. REINSCH.

FRIDAY, APRIL 29, 1910

At ten o'clock

Reception to the members of the Society by the President of the United States.

At eleven o'clock

Business meetings of the Executive Committee and Editorial Board.

At one thirty o'clock

General Subject: The Basis of Protection to Citizens Residing Abroad, divided into the following topics:

1. The question of the limitation of protection by contract between the citizen and a foreign government or by municipal legislation.
   Speakers: PROF. G. W. SCOTT, EDWIN M. BORCHARDT, ESQ.
2. The citizenship of individuals, or of artificial persons (such as corporations, partnerships, etc.) for whom protection is invoked.
   Speaker: PROF. RALEIGH C. MINOR.

At eight o'clock

3. The question of domicile in its relation to protection.
   Speakers: PROF. S. M. MACVANE, PROF. JOHN H. LATANÉ.
4. The effect of the unfriendly act or inequitable conduct of the citizen upon the right to protection.
   Speakers: PROF. THEODORE S. WOOLSEY, ARTHUR K. KUHN, ESQ.

SATURDAY, APRIL 30, 1910

At ten o'clock.

5. The place of denial of justice in the matter of protection.
   Speakers: PROF. EUGENE WAMBAUGH, WALTER S. PENFIELD, ESQ.
6. Intervention for breach of contract or tort where the contract is broken by the state or the tort committed by the government or governmental agency.
   Speakers: R. FLOYD CLARKE, ESQ., C. L. BOUVÉ, ESQ.

At two o'clock

Preliminary report of Committee on Codification on the history of codification and on the scope and plan of codification under the resolution adopted at the Third Annual Meeting.

At seven o'clock

ANNUAL BANQUET AT THE NEW WILLARD HOTEL.

FOURTH ANNUAL MEETING

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

NEW WILLARD HOTEL, WASHINGTON, D. C.,

April 28–30, 1910

THURSDAY, April 28, 1910

The meeting was called to order at 8 o'clock p. m. by the President of the Society, Hon. Elihu Root.

Mr. ROOT. Ladies and Gentlemen: It is a pleasure to greet you here for the fourth meeting of the American Society of International Law. I think we may congratulate ourselves on the continued prosperity and usefulness of the Society. It is rather an extraordinary thing that a society dealing with a topic ordinarily regarded as so abstruse and dry as any branch of the law, should be able, from the very beginning, to maintain itself, to put itself upon a self-supporting basis, and continue that status without interruption, as this Society has for the past four years. While we see countless examples of bankrupt publications, the journal of the Society has maintained its full standard of merit and interest, and has been regularly published without any occasion for calling upon any one for assistance, except with his pen.

There have been a number of interesting events in the domain of international law during the past year. The course of arbitration has shown greatly increased activity. It has shown a much broader scope and adherence on the part of the civilized countries of the world than we have been accustomed to find.

Perhaps the most important have been the Casablanca arbitration

between France and Germany at The Hague last May, and the settlement of the maritime boundary between Norway and Sweden, which was disposed of at The Hague last October. There has been a settlement of the boundaries between Bolivia and Peru, by arbitration of the Argentine Republic, which occurred last summer.

There are now in progress two other arbitrations at The Hague, which will be disposed of within a few weeks, to which this country is a party, the most important of which is what we speak of as the Newfoundland Fisheries Arbitration, and what is officially called the Atlantic Fisheries Arbitration between the United States and Great Britain. Beginning on the 1st of June, we are to try, before that high tribunal, the old questions upon which depend rights for which John Adams and John Jay fought like desperadoes in the negotiations for the treaty of peace in 1782, and the treaty of peace with England for which John Quincy Adams and Richard Rush contended enthusiastically, and settled, in the treaty of 1818.

There have been a number of settlements of interest to us as Americans, without arbitration. The Emery controversy with Nicaragua, which caused a great deal of trouble for a great many years, and was about to be submitted to arbitration, was, on the eve of arbitration, settled peaceably. The Alsop case with Chile has been submitted to the King of Great Britain for arbitration.

The difficulties which threatened to involve the southern portion of South America in war and caused a very threatening condition, regarding the rights over the River Plata of the countries upon either side, between Uruguay and the Argentine Republic, have been smoothed over by a specific agreement of the two Powers to continue the *status quo*.

The situation which, at one time, seemed likely to involve all Europe in war, arising over the annexation of Bosnia-Herzegovina, was fortunately averted by an agreement of the Powers interested, without submitting to arbitration and without calling a conference.

There have been a great many other arbitration treaties made during the year, and nine in the list are treaties of arbitration made by Brazil, which was one of the last American countries to come

into our scheme of arbitration, showing that she has now manifestly placed herself upon a general arbitration basis. A number of other smaller treaties have been made.

I think the most interesting thing for us Americans is the favorable reception of a communication in the form of a circular note from Mr. Knox, our Secretary of State, to the principal European Powers, with regard to the further development of the process which was advanced so much at the last Hague Conference, looking to a judicial settlement of international differences. I speak of a judicial settlement as distinct from ordinary arbitration, which too often means a compromise or settlement in a diplomatic way by the arbitrators. Mr. Knox proposed two things: one, that the prize court should be modified and that an opportunity should be afforded for nations adhering to it to modify it so far as to substitute a review *ab initio* of questions of prize in place of an appeal from and review of the decision of the court of the country concerned. That has been so generally assented to that it is quite evident the way is smoothed for the United States to become a party to that convention, unobstructed and unhindered by the difficulty which we have experienced in the way of making any tribunal superior to our Supreme Court. The difficulty that there is no constitutional power, that the treaty-making power of the United States does not, under the Constitution, extend to nullifying the provision of the Constitution that there shall be one Supreme Court, which stood like a lion in our way, I think is, happily, in the way to be solved.

The other proposition was to solve the difficulty that was found at the last Hague Conference in the constitution of a general court of arbitral justice. The difficulty was that the countries represented there could not agree upon the selection of the judges. The very large countries, many of them, were unwilling to permit the numerous small countries to have the same voice with themselves in the selection of the judges, and many of the very small countries were unwilling to admit the impeachment of their equality by submitting to having the large countries select more judges than they did, so that the Hague Conference framed a *projet* or a convention establishing a court of arbitral justice, as distinguished from an

ordinary arbitration, and recommended that it be adopted. The proposition is made that this prize court, the constitution of which is all agreed to, shall have vested in it general jurisdiction to sit as a court in the hearing and determination of general questions, or that another court be organized in the same way. It is quite apparent that it is receiving favorable consideration, and we may have the highest hope of its practical fruition.

ADDRESS OF HON. ELIHU ROOT, PRESIDENT OF THE SOCIETY,

ON

The Basis of Protection to Citizens Residing Abroad

I shall ask you to listen for a few minutes to some remarks regarding the protection which a nation should extend over its citizens in foreign countries. I do not select this topic because I have anything new to say about it, or because there is any real controversy among international lawyers concerning the principles involved or concerning the fundamental rules to be applied, but because there is a considerable degree of public misunderstanding about the subject, and situations are continually arising in which a failure of the public in one country or another to justly appreciate the extent and nature of international obligation leads to resentment and unfriendly feeling that ought to be avoided.

The subject has grown in importance very rapidly during recent years. The world policy of commercial exclusiveness prevailing in the early part of the last century has practically disappeared. The political relations on the one hand and the commercial and industrial relations on the other hand of different parts of the earth to each other are quite separate and distinct. It is not uncommon to find that a nation has commercial colonies which bear no political relation to her whatever, and political colonies which are industrially allied most closely to other countries.

The increase in facilities for transportation and communication — steamships and railroads and telegraphs and telephones — has set in motion vast armies of travelers who are making their way into the most remote corners of foreign countries to a degree never before known.

The general diffusion of intelligence among the people of all civilized, and to a considerable degree of semi-civilized, countries, has carried to the great mass of the people — the working people of the world — a knowledge of the affairs and the conditions of life in other lands; and this, with the cheapness and ease of transportation, has led to enormous emigration and shifting of population. One of the salient features of modern political development has been the severance of the people from the soil of their native countries. The peasant, who was formerly a fixture in his native valley, unable to conceive of himself as a part of any life beyond the circle of the surrounding hills, now moves freely to and fro, not only from one community to another, but from one country to another. Labor is becoming fluid, and, like money, flows towards the best market without paying much attention to political lines. The doctrine of inalienable allegiance so inconsistent with the natural course of development of the new world, and so long and so stoutly contested by the United States, has been almost universally abandoned. It is manifest that the few nations which have not given their assent to the right of their citizens to change their citizenship and allegiance as they change their residence will not long maintain their position. This change has led to a new class of citizens traveling or residing abroad; that is, the naturalized citizen, who, returning to his country of origin or going to still other countries, claims the protection not of his native but of his adopted government. Among the great throngs of emigrants to other countries may be distinguished two somewhat different classes — one composed of those who have transferred their substantial interests to the new country and are building up homes for themselves; the other class composed of those who still continue their principal interests in the country from which they have come and under their new conditions are engaged in accumulating means for the better support of the families and friends they have left behind them, or for their own future support after the return to which they look forward.

The great accumulation of capital in the money centers of the world, far in excess of the opportunities for home investment, has led to a great increase of international investment extending over

the entire surface of the earth, and these investments have naturally been followed by citizens from the investing countries prosecuting and caring for the enterprises in the other countries where their investments are made. For example, it was estimated three or four years ago that within the preceding ten years over seven hundred millions of capital had gone from the United States alone into Mexico for investment; and this capital had been followed by more than forty thousand citizens of the United States who had become resident in Mexico. This same process has been going on all over the world.

All these forms of peaceful interpenetration among the nations of the earth naturally contribute their instances of citizens justly or unjustly dissatisfied with the treatment they receive in foreign countries and calling upon their own governments for protection. In two directions the process has gone so far as to justify and receive limitation. On one hand, there has come to be a recognition of the essential difference between emigration *en masse,* by means of which the people of one country may virtually take possession of considerable portions of the territory of another country to the practical exclusion of its own citizens, and the ordinary travel and residence upon individual initiative to which the usual conventions relating to reciprocal rights of travel and residence relate. The occasion for considering this difference naturally depends very much upon the capacity of the emigrants for assimilation with the people of the country to which they go. The wider the differences in race, customs, traditions, and standards of living, the less is the probability of assimilation and the greater the certainty that emigration of large bodies of people will assume the character of peaceful invasion and occupation of territory. After many years of discussion China has come to recognize the existence of such a distinction in respect of Chinese emigration to North America. Japan has recognized it from the first, and there has never been any question between the Governments of Japan and the United States upon that subject.

On the other hand, the United States has itself put a limit upon the practice, which had already reached the point of serious abuse,

of permitting the natives of other countries to become naturalized here for the purpose of returning to their homes or seeking a residence in third countries with the benefit of American protection. Several years ago it was estimated that there were in Turkey seven or eight thousand natives of Turkey who had in one way and another secured naturalization in the United States and had gone home to live with the advantage over their friends and neighbors of being able to call upon the American embassy for assistance whenever they were not satisfied with the treatment they received from their own government. At the time of the troubles in Morocco, which were disposed of at the Algeciras Conference, an examination of the list of American citizens in Morocco showed that one-half of the list consisted of natives of Morocco who had been naturalized in the United States and had left this country and gone back to Morocco within three months after obtaining their naturalization papers. We have now adopted a rule, which has been embodied in a number of treaties and in the Act of Congress of March 2, 1907, for the purpose of checking this abuse. The new rule is, that when a naturalized citizen leaves this country instead of residing in it, two years' residence in the country of his origin or five years' residence in any other country creates a presumption of renunciation of the citizenship which he has acquired here, and unless that presumption is rebutted by showing some special and temporary reason for the change of residence, the obligation of protection by the United States is deemed to be ended.

I have dwelt upon the magnitude and diversity of the causes which are resulting in the presence in each civilized country of great numbers of citizens of other countries, because conditions so universal plainly must be dealt with pursuant to fixed, definite, certain, and universally recognized rules of international action.

The simplest form of protection is that exercised by strong countries whose citizens are found in parts of the earth under the jurisdiction of governments whose control is inadequate for the preservation of order. Under such circumstances in times of special disturbance it is an international custom for the countries having the power to intervene directly for the protection of their own citizens,

as in the case of the Boxer rebellior in China, when substantially all the Western powers were concerned in the march to Pekin and the forcible capture of that city for the protection of the legations. On a smaller scale, armed forces have often been landed from men-of-war for the protection of the life and property of their national citizens during revolutionary disturbances, as, for example, in Central America and the West Indies. Such a course is undoubtedly often necessary, but it is always an impeachment of the effective sovereignty of the government in whose territory the armed demonstration occurs, and it can be justified only by unquestionable facts which leave no practical doubt of the incapacity of the government of the country to perform its international duty of protection. It leads to many abuses, especially in the conduct of those nationals who, feeling that they are backed up by a navy, act as if they were superior to the laws of the country in which they are residing and permit their sense of immunity to betray them into arrogant and offensive disrespect.

Similar in principle to the method of direct protection which I have mentioned is the practice of exercising extraterritorial jurisdiction, under convention arrangements, in countries whose methods of administering justice are very greatly at variance with the methods to which the people of the great body of civilized states are accustomed, such, for example, as China and Turkey.

As between countries which maintain effective government for the maintenance of order within their territories, the protection of one country for its nationals in foreign territory can be exercised only by calling upon the government of the other country for the performance of its international duty, and the measure of one country's international obligation is the measure of the other country's right. The rule of obligation is perfectly distinct and settled. Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens. In the famous Don Pacifico case, Lord Palmerston said, in the House of Commons:

> If our subjects abroad have complaints against individuals, or against the government of a foreign country, if the courts of law of that country can afford them redress, then, no doubt, to those courts of justice the British subject ought in the first instance to apply; and it is only on a denial of justice, or upon decisions manifestly unjust, that the British Government should be called upon to interfere. But there may be cases in which no confidence can be placed in the tribunals, those tribunals being, from their composition and nature, not of a character to inspire any hope of obtaining justice from them. It has been said: "We do not apply this rule to countries whose governments are arbitrary or despotic, because there the tribunals are under the control of the government, and justice can not be had; and, moreover, it is not meant to be applied to nominally constitutional governments, where the tribunals are corrupt."
>
> I say, then, that our doctrine is, that, in the first instance, redress should be sought from the law courts of the country; but that in cases where redress can not be so had — and those cases are many — to confine a British subject to that remedy only, would be to deprive him of the protection which he is entitled to receive. * * *
>
> We shall be told, perhaps, as we have already been told, that if the people of the country are liable to have heavy stones placed upon their breasts, and police officers to dance upon them; if they are liable to have their heads tied to their knees, and to be left for hours in that state; or to be swung like a pendulum, and to be bastinadoed as they swing, foreigners have no right to be better treated than the natives, and have no business to complain if the same things are practiced upon them. We may be told this, but that is not my opinion, nor do I believe it is the opinion of any reasonable man.

Nations to which such observations apply must be content to stand in an intermediate position between those incapable of maintaining

order, and those which conform fully to the international standard. With this understanding there are no exceptions to the rule and no variations from it. There may be circumstances at particular times and places such that the application of the rule calls for action regarding foreign citizens quite unlike the action ordinarily taken for the benefit of native citizens, but it is always action which would be equally required in case a native citizen were placed under the same circumstances of exigency. It is plain that no other rule is practicable. Upon any other basis every country would be obliged to have two systems of law and administration and police regulations, and the existence of great numbers of foreigners in a country would be an intolerable burden. The standard to which the rule appeals is a standard of right, and not necessarily of actual performance. The foreigner is entitled to have the protection and redress which the citizen is entitled to have, and the fact that the citizen may not have insisted upon his rights, and may be content with lax administration which fails to secure them to him, furnishes no reason why the foreigner should not insist upon them and no excuse for denying them to him. It is a practical standard and has regard always to the possibilities of government under existing conditions. The rights of the foreigner vary as the rights of the citizen vary between ordinary and peaceful times and times of disturbance and tumult; between settled and ordinary communities and frontier regions and mining camps.

The diplomatic history of this country presents a long and painful series of outrages on foreigners by mob violence. These have uniformly been the subject of diplomatic claims and long-continued discussion, and ultimately of the payment of indemnity. An examination of these discussions will show that in every case the indemnity was in fact paid because the United States had not done in the particular case what it would have done for its own citizens if our laws had been administered as our citizens were entitled to have them administered. Of course, no government can guarantee all the inhabitants of its terrritory against injury inflicted by individual crime, and no government can guarantee the certain punishment of crime; but every citizen is entitled to have police protection

accorded to him commensurate with the exigency under which he may be placed. If he is able to give notice to the government of intended violence against him he is entitled to have due measures taken for its prevention, and he is entitled always to have such vigorous prosecution and punishment of those who are guilty of criminal violation of his rights that it will be apparent to all the world that he cannot be misused with impunity and that he will have the benefit of the deterrent effect of punishment.

It is a distressing fact that in one important respect the Government of the United States fails to comply with its international obligation in giving the same degree of protection and opportunity for redress of wrong to foreigners that it gives to its own citizens. The difficulties which beset aliens in a strange land are ordinarily local difficulties. The government and the people of the foreign country are usually quite ready, in a broad and abstract way, to accord to foreigners the fullest toleration, equality before the law, and protection. But the people of the particular community with whom the alien comes in contact too often fail of understanding and sympathy. They misunderstand and resent the foreign customs with which they are unfamiliar. They are aroused to anger by the competition to which the foreigner subjects them. Immediate contact is too apt at first to breed dislike and intolerance towards what Bret Harte describes as the "defective moral quality of being a foreigner." Our Constitution recognizes this natural and often inevitable prejudice by giving to our national courts jurisdiction over all civil suits between aliens and citizens of the United States. We fail to recognize the same conditions, however, in respect of the security of the persons and property of aliens. The Revised Statutes of the United States aim to protect citizens of the United States against local prejudice and injury by providing in section 5508:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or

privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

This provision, however, does not apply to aliens, and no similar provision applies to them. Accordingly, defenseless Chinamen were mobbed at Denver in 1880, and at Rock Springs, Wyoming, in 1885; Italians were lynched in New Orleans in 1891, and again at Rouse, Colorado, in 1895; and Mexicans were lynched at Yreka, California, in 1895; and Italians at Tallulah, Louisiana, in 1899, and again at Erwin, Mississippi, in 1901. Our Government was practically defenseless against claims for indemnity because of our failure to extend over these aliens the same protection that we extend over our own citizens, and the final result of long diplomatic correspondence in each case was the payment of indemnity for the real reason that we had not performed our international duty. In these discussions our State Department from time to time undertook to shelter itself behind the distribution of power in our constitutional system, and the fact that there was no law of the United States providing for any redress except at the hands of the State officials in the very locality where prejudice led to the injury. Yet when an American citizen was injured by a mob in Brazil in 1875, the dispatch of Secretary Fish to the American Minister at Rio said:

> You represent that the facts as set forth in the memorial of the claimant are admitted by that Government, which, however, denies its accountability and says that the province where the injury to Mr. Smyth took place is alone answerable. Supposing, however, the case to be a proper one for the interposition of this Government, the reference of the claimant to the authorities of the province for redress will not be acquiesced in. Those authorities can not be officially known to this Government. It is the Imperial Government at Rio de Janeiro only which is accountable to this Government for any injury to the person or property of a citizen of the United States committed by the authorities of a province. It is with that Government alone that we hold diplomatic intercourse. The same rule would be applicable to the case of a Brazilian subject who, in this country, might be wronged by the authorities of a State.

And President Harrison, in his message to Congress of December 9, 1891, relating to the lynching of Italians at New Orleans in that year, said:

> Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts. This has not, however, been done, and the federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights.

It is to be hoped that our Government will never again attempt to shelter itself from responsibility for the enforcement of its treaty obligations to protect foreigners by alleging its own failure to enact the laws necessary to the discharge of those obligations.

The most frequent occasions of appeal by citizens for protection in other countries arise upon the assertion that justice has been denied them in the courts, and this appears, unfortunately, to be a frequent occurrence. The justification of such complaints does not rest upon any obligation of another country to furnish any better or different judicial relief or procedure to foreigners than is provided for the citizens of the country itself, but it results from the fact that in many countries the courts are not independent; the judges are removable at will; they are not superior, as they ought to be, to local prejudices and passions, and their organization does not afford to the foreigner the same degree of impartiality which is accorded to citizens of the country, or which is required by the common standard of justice obtaining throughout the civilized world. When justice is denied for such reasons there is a failure on the part of the government to perform its international duty, and a right on the part of the government whose citizen has failed to secure justice to demand reparation.

A large proportion of such complaints are, however, without just foundation. Citizens abroad are too apt to complain that justice has been denied them whenever they are beaten in a litigation, forgetting that, as a rule, they would complain just the same if they were beaten in a litigation in the courts of their own country. When a man goes into a foreign country to reside or to trade he submits himself, his rights, and interests to the jurisdiction of the courts of that country. He will naturally be at a disadvantage in litigation against citizens of the country. He is less familiar than they with the laws, the ways of doing business, the habits of thought and action, the method of procedure, the local customs and prejudices, and often with the language in which the business is done and the proceedings carried on. It is not the duty of a foreign country in which such a litigant finds himself to make up to him for these disadvantages under which he labors. They are disadvantages inseparable from his prosecuting his business in a strange land. A large part of the dissatisfaction which aliens feel and express regarding their treatment by foreign tribunals results from these causes, which furnish no just ground for international complaint. It is very desirable that people who go into other countries shall realize that they are not entitled to have the laws and police regulations and methods of judicial procedure and customs of business made over to suit them, or to have any other or different treatment than that which is accorded to the citizens of the country into which they have gone; so long as the government of that country maintains, according to its own ideas and for the benefit of its own citizens, a system of law and administration which does not violate the common standard of justice that is a part of international law; and so long as, in conformity with that standard, the same rights, the same protection, and the same means of redress for wrong are given to them as are given to the citizens of the country where they are. On the other hand, every one who goes into a foreign country is bound to obey its laws, and if he disobeys them he is not entitled to be protected against punishment under those laws. It follows, also, that one in a foreign country must submit to the inconvenience of proceedings that may be brought in accordance with law upon any

bona fide charge that an offense has been committed, even though the charge may not be sustained. Nevertheless, no violation of law can deprive a citizen in a foreign country of the right to protection from the government of his own country. There can be no crime which leaves a man without legal rights. One is always entitled to insist that he shall not be punished except in accordance with law, or without such a hearing as the universally accepted principles of justice demand. If that right be denied to the most desperate criminal in a foreign country, his own government can and ought to protect him against the wrong.

Happily, the same causes which are making questions of alien protection so frequent are at the same time bringing about among all civilized peoples a better understanding of the rights and obligations created by the presence of the alien in a foreign country; a fuller acceptance of the common international standard of justice, and a gradual reduction of the local prejudices and misunderstandings which stand in the way of the alien's getting his full rights. Discussions between governments upon complaints of wrong to their citizens tend more and more to relate to questions of fact upon the determination of which accepted and settled rules can be readily applied. And in all nations the wisdom and sound policy of equal protection and impartial justice to the alien is steadily gaining acceptance in the remotest parts and throughout even the least instructed communities.

[Hon. Charles Nagel, the next speaker, was unable to be present on account of the pressure of official business. His place on the program was taken by Dr. James Brown Scott, who read a portion of the report of the Committee on Codification. The address which Mr. Nagel had prepared for delivery follows:]

ADDRESS OF HON. CHAS. NAGEL, SECRETARY OF COMMERCE AND LABOR,

ON

The Codification of International Law

The suggestion for the codification of international law is no doubt to be attributed to a growing desire to promote peace among the nations.

Before discussing whether or not the plan is practicable we ought perhaps to determine first in just what sense the term is to be employed; for it must be admitted that codification has been held to embrace everything from the most spasmodic statutory legislation to the creation of a complete system of law. It is safe to say that the modern system of statutory legislation is not to be considered for the purposes of this discussion; for at best it is but a substitute for the older method of the development of law by the evolution of custom. We have therefore to deal with the term codification in the broader sense, in which it is used on the one hand to mean a mere digest or statement of existing law in condensed and improved form, and on the other hand as a recast of both existing and newly adopted rules of law into one consistent and final system.

With a few distinguished exceptions, codification in this broader sense has been considered more especially with respect to municipal law. As is well known, it has in this field had its advocates and its supporters, of which perhaps no better illustration can be given than the great contest over the Field Code. The most generally accepted conclusion appears to be that codification is desirable if the purpose be merely to obtain clearness, brevity, and harmony for existing law. Something more than the aggregations of a digest, but not enough to retard wholesome development. Mr. Carter's arguments seem to have prevailed. There are few to deny that our country, for illustration, is not ripe for codification in the broadest sense; and that the attempt would inevitably paralyze normal growth.

The instances in which such a codification have been justified have really been exceptions based upon peculiar conditions, as, for illustration, the necessity for providing an immediate and comprehensive system for a people brought together by war or some equally compelling influence; and even in those cases the code has been treated as a present basis to be built upon by future legislation for which ample provision is made.

Our first question is whether the considerations which seem to have been decisive with respect to municipal law are likely to have a similar influence in the case of international law. The divergence of conditions is manifest. There is no self-determining authority —

no constituted power to frame or to enforce a code. There is no machinery which may be set in motion at will. It may be urged that the machinery can be provided; but such an effort would have poor hope of success unless its purpose be closely defined and restricted from the beginning. Nevertheless, the cases of municipal law and of international law do not necessarily stand so far apart.

So long as the aim is merely to give clear and definite form to those rules and principles which in one shape or another constitute accepted international law among civilized nations, I can not believe that there is a controlling obstacle. I would say this not so much because of any direct analogy between the conditions obtaining in the development of municipal and international law; but because the progress in the understanding of civilized nations has of late years been so wonderful that anything within reason must be called not only possible, but probable.

This ought to be peculiarly true of those principles of international law which in effect constitute inhibitions upon the course or conduct of nations. In municipal law the crimnal code has always been made an excepton even by the most pronounced opponents of codification. Wherever the state declares an inhibition upon the conduct of its citizens, it becomes of controlling importance to have that inhibition so distinctly stated that it may form the basis of a penal proceeding. It would seem, therefore, that wherever the civilized nations by common understanding or by special agreement have decided that certain conduct is improper and will not be tolerated, the rules governing such a situation should be finally, clearly, and definitely expressed in writing. Nor does it seem likely, in view of the great progress made during the last few years, that such an effort would meet with insurmountable difficulties.

Beyond that, however, as it appears to me, it would be dangerous to go. There is no accepted method of legislation, and probably nothing corresponding to a representative legislative body of the several nations is practicable. As a mere matter of method the development of international law must therefore be left to other agencies. And more particularly would the same difficulties that have been recognized in case of municipal law, necessarily operate

to defeat a general codification of international law in the broadest sense. The attempt to anticipate, or to force the acceptance of new rules of action would not only be likely to fail, but would probably serve to retard the natural growth upon which we have every reason to rely. The inevitable effect would be to hamper the action of the most enlightened nations; because the same common consent which in the first instance would be required in the adoption of a code, would afterwards be necessary for every modification. Whereas, without this binding or retarding force, the wholesome development of international law is most satisfactorily promoted by conferences and agreements between progressive Powers. These will be stimulated by actual or apprehended conditions, will always furnish most persuasive example to other Powers that are not immediate parties, and may sometimes even feel impelled to insist upon a general conformity to rules of undeniable equity and justice. Nor need we trust to this process alone. If the legislative and the judicial branches as commonly understood are lacking in the international system, there is every reason to hope for the development of arbitration tribunals as the substitute for both. Progress in this direction is so marked that we may confidently look to them for the solution of many problems.

But even here it appears to me that the element of compulsion and rigidity should be avoided as mush as possible. It seems to me that the suggestion of Ambassador Bryce upon this subject is most persuasive:

> The value of arbitration or of conciliation by a third party lies not merely in its providing a means of determining a difficult issue of law or fact, but in its making it easy for the contracting parties to abate their respective pretensions without any loss of dignity.

The secret of good legislation is the creation of conditions that may solve themselves. Mere rules of compulsion fail all too frequently, as the experience in our own country with domestic law amply illustrates. As much would certainly be true in the case of international relations. If a nation is unwilling to abide by an agreement, a pretext or reason for its refusal can always be found. If

the rule is too rigid and compulsion is the word, the suggestion for refusal to abide is almost invited. In fact, a government may find difficulty in having its own people acquiesce, for the one reason that an outside authority is undertaking to enforce the rule. Such a provision would be too apt to constitute a challenge to popular sentiment. This danger of any attempt at compulsion was most persuasively stated by Secretary Root in his instruction to the American delegation to the Second Hague Conference:

In the discussions upon every question it is important to remember that the object of the conference is agreement and not compulsion. If such conferences are to be made occasions for trying to force nations into positions which they consider against their interests, the Powers can not be expected to send representatives to them. It is important also that the agreements reached shall be genuine and not reluctant; otherwise they will inevitably fail to receive approval when submitted for the ratification of the Powers represented. Comparison of views and frank and considerate explanation and discussion may frequently resolve doubts, obviate difficulties, and lead to real agreement upon matters which at the outset have appeared insurmountable. It is not wise, however, to carry this process to the point of irritation. After reasonable discussion, if no agreement is reached, it is better to lay the subject aside or refer it to some future conference in the hope that intermediate consideration may dispose of the objections. Upon some questions where an agreement by only a part of the Powers represented would in itself be useful, such an agreement may be made, but it should always be with the most unreserved recognition that the other Powers withhold their concurrence with equal propriety and right.

The immediate result of such a conference must always be limited to a small part of the field which the more sanguine have hoped to see covered; but each successive conference will make the positions reached in the preceding conference its point of departure, and will bring to the consideration of further advances towards international agreement opinions affected by the acceptance and application of the previous agreements. Each conference will inevitably make further progress, and, by successive steps, results may be accomplished which have formerly appeared impossible.

The wiser course would appear to be to act upon the assumption that all governments are more and more anxious to have peace upon

fair terms. No powerful nation can today abuse its position without loss of influence among the nations. The real question is, what are fair terms, or what is just, and how is the question to be determined? As Secretary Root said in his address before the American Society of International Law, April 23, 1909:

The chief principle entering into this standard of conduct is that every sovereign nation is willing at all times and under all circumstances to do what is just. That is the universal postulate of all modern diplomatic discussion. No nation would for a moment permit its own conformity to the standard in this respect to be questioned. The obligation which this willingness implies is no impeachment of sovereignty. It is voluntarily assumed as an incident to the exercise of sovereignty because it is essential to a continuance of the conditions under which the independence of sovereignty is possible. This obligation is by universal consent interpreted according to established and accepted rules as to what constitutes justice under certain known and frequently recurring conditions; and these accepted rules we call international law. No demand can ever be made by one nation upon another to give redress in any case but that the demand is met by an avowed readiness to do justice in that case, and upon that demand in accordance with the rules of international law. No compulsion upon sovereignty is needed to reach that result.

The only question that can arise upon such a demand is the question, "What is just in this case?" In that necessary condition of agreement upon the underlying principle to be followed, a common duty is presented to both nations to ascertain and determine what is just.

A government engaged in a controversy may be unable to bring its own people to submit to fixed rigid terms, when there would be no difficulty with a decision imposed as a result of an independent hearing. The opportunity to submit and to arbitrate a controversy therefore recommends itself as the real avenue to peaceful solution, because that opportunity renders it more and more difficult to find even so much as plausible excuse for positions that would command the respect or patience of other nations. By such means the development of better standards is most apt to find its ultimate and authoritative expression.

As domestic public opinion makes and unmakes municipal law,

written or unwritten; so international public opinion is the great arbiter of our time, to whose progressive standards unreasonable and unfair demands will have to yield more and more.

As Secretary Knox said in his address before the Pennsylvania Society of New York, December 11, 1909:

The disposition, then, to take concerted international action grows with the opportunity thus afforded by the marvelous modern development in the means of communication. Each nation instantaneously feels the compulsion of the public opinion of all nations. Compare, for example, modern exchanges of views between governments, swiftly reaching a common basis of action and resulting increasingly in ends beneficent to the whole world, with former ignorance and mutual suspicions largely due to ignorance, resulting in no common action and permitting aggressions and abuses by single nations or small groups which today the concert of all nations protests against more and more loudly and less and less tolerates.

Then, just as individuals and separate nations advance in the fruits of civilization and display in their conduct higher regard for honesty and justice and peace and less tolerance for wrong and oppression and cruelty, so these ideals of private and national conduct are manifestly inspiring all nations in their relations with each other. As nations understand each other better and the world draws closer together in the recognition of a common humanity and conscience, of common needs and purposes, there is carried into the international field the insistent demand for greater unity in enforcing everywhere the principles of a high morality, and, by restraints mutually applied and observed, all the human ameliorations without which both national and international life would soon fall into anarchy and decadence.

The chief reliance, therefore, does not seem to rest with the hard and fast rule, but rather with the influence of the world's moral force. The triumph of that force is the growing recognition of mutual international relations and obligations — that common justice for all which has been, wisely and moderately, but constantly advanced by our own statesmen.

Mr. Root. We will be very happy to hear from Professor Reinsch.

ADDRESS OF PROF. PAUL S. REINSCH, OF THE UNIVERSITY OF WISCONSIN,

ON

The Codification of International Law

We live in a constructive age. Mere analysis, mere study of detail in particular facts and relations, no longer satisfies our present intellectual needs. There is a desire to pass beyond the gathering up and classifying of detail to a more complete and profound grasp of essential realities. Intellectual pursuits aim at a deeper insight into life, the determination of a balance between the varied human interests. In the field of law, too, this tendency has revealed itself. The rapidly growing mass of legal precedent pouring forth in scores and hundreds of volumes every year has threatened to stifle the original power of mind over the materials it works with. We feel the need of a more profound study of juristic principle. The fiber of the mind must be strengthened by constructive reasoning, lest all vigor and pliability may be lost in the bare endeavor to assimilate precedents. Jurisprudence must not be allowed to degenerate into what Chinese knowledge was before the reform began — a mechanical system of commentary upon commentary — devoid of the vitalizing power of human personality. It is this constructive capacity our law faculties aim to develop in their students by a proper use of the case method — which is not mere analysis, but includes original legal reasoning as well.

Our own particular science feels the impulse of the age in an even stronger measure than does the science of law in general. Men who speak with authority in the councils of nations use such expressions as "new horizons in international law," "the need of a new international law conforming to the spirit of the times," "international organization." It is in the great constructive work of the international conferences that the spirit of the times is most strikingly revealed. At The Hague, at London, at Rio de Janiero, and Buenos Aires, at all the various conferences of the public international unions, the work of gathering up our methods, customs, and practices into new concepts and universal rules goes on apace. The

seemingly impossible appears simple and easy after it has been effected — so natural that former controversies suddenly seem devoid of real substance. As an example, think for a moment of the principles established by the London Declaration. Think of their simplicity and reasonableness, their just balance. How inevitable they seem, and yet what tomes of controversial literature, what a phalanx of official precedents they had to overcome and supersede. Their adoption indicates the true function of international jurisprudence. It must build upon precedent, but also point out the way to simple and natural solutions of difficulties.

When such extensive works of a constructive character are being undertaken, when, as it were, the world has resolved itself into a constitutional convention for the enactment and definition of principles that will for a long time dominate our thought and action, when we are wearing grooves in which our affairs will run along for centuries, it behooves every nation to prepare itself for taking a well-considered part in this world-wide movement. So in response to the spirit of the times, both as a duty to our national life and to our science, we may well turn from the study of detailed problems, from the settlement of individual relations, and for awhile consider those broader underlying principles, a clear understanding of which will give us definiteness of purpose in an age constructive beyond precedent.

Shall we then say that the time is ripe for the creation of a code of international law, a great law-book comprising a complete system of international rights and duties? Let us try to set before our minds all that is involved in such an undertaking. Assuredly, the general idea is fascinating, but we should also be clear upon the practical conditions, the specific requirements of such a task. Practical men desire a demonstration of workableness; even if the idea is so extremely enthralling as that of flight in the air, we call for prosaic details of a mechanical nature.

A law-book ought to rest upon a basis of positive enactment or custom. Jurist and publicists find a prolific source of difficulty in the presence of ideas and principles brought into international law at a time when its sanction was based upon the law of nature, a

rationalist conception varying in content and character from man to man. All such *a priori* constructions are foreign to the spirit of our age, which insists upon the positivist methods developed in the last century. Modern juristic construction in international law must, therefore, seek its foundation in treaties, diplomatic practice, and general custom. Once we are delivered from the network of *a priori* reasoning, what a fascinating field of work opens up before us? Life itself, in all its richness, its never-ending variety, meets us in the materials of our work, as we study the acts of statesmen, diplomatic correspondence, court decisions, arbitral sentences, and official instructions.

The point of view in codification is essentially juristic. We are dealing with law, with authoritative principles of public action enunciated by men who join in their person authority and responsibility as statesmen, diplomats, and judges. In this connection, however, we have to distinguish clearly between such principles which announce a national policy or result from a national law, and those which are based upon acknowledged deference to a duty binding upon nations in their intercourse with each other. It is this acknowledged obligation which constitutes the jural basis of international law. Nations have recognized that the relations which bind them together can not, as a matter of practical wisdom, be left dependent on the whim of the moment. There is need of permanence, of assurance, of definiteness in modes of procedure. We can not constantly be restating and rearguing the basis of our ordinary relations with each other; intercourse is possible, life is endurable, only where such fundamental relations are taken for granted and are mutually respected. Such acknowledgment may at times, in important matters, be made by solemn treaties, but in most cases it is evidenced merely by the manner in which responsible persons act time after time. Men in positions of public responsibility seek for precedents. They do not desire to take the heavy burden of action in matters of public concern without the guidance of what other men in similar situations have thought the just and equitable mode of action.

Any attempt at codification should be carried on with the same sense of conservatism and responsibility. Its purpose is not to

enforce preconceived notions nor to solve difficulties by reference only to theoretical factors, but to master the considerations which have guided men in dealing with international affairs — in diplomacy, in arbitral judgments, in treaty-making.

Legal matters ought to be distinguished from political interests. One of the most serious hindrances to the development of a clear and authoritative international law has been this intermingling of political and legal considerations. Sometimes there has been merely a lack of close reasoning, but again frequently statesmen have attempted to strengthen a national policy by claiming for it the character of international law. Principles must be taken out of politics to be made law. Any policy which still proves to be of vital importance in that great struggle for independence, authority and influence, which we call politics, can not truly be a part of international law. Concerning it disputes will continue to be waged; and only as political competition passes on to other fields will our principles enter the calm atmosphere of demonstration and judicial establishment. In our national law, the responsibility of a master for the acts of his agent is not a matter of politics, but political contests are still waged over the imposition of a greater liability upon the master for injuries to his servant. No judge would be justified in anticipating the results of such a struggle. Even so in international law, no jurist should treat that as law about which political controversy still rages. It should be frankly admitted that the legal character of such principles is not as yet established.

International law has, however, passed beyond the stage of being a theory gathered from the clouds by which nations hide the selfishness of their designs. If above we discouraged the treatment of national policies as law, on the other hand, there can be no doubt that too many relations concerning which there can be no longer any vital controversy, are still persistently treated from the point of view of a narrow national tradition. The international jurist ought, therefore, not to content himself with digesting and arranging those principles concerning which all controversy has disappeared. It is also his duty and function to extend the sway of law by showing that certain questions which are still viewed from the angle of

political hostility are no longer vitally a part of the policy of national self-preservation. Again the principles established through the London Declaration show how advantageous it is to give up the traditional view of international law which has lost its vital connection with national policies, although it is still imbedded in the written sources of legal authority. Thus the realm of law is expanding. Differences of view are being dissolved by a better understanding of the real purposes of national states and the true requirements of international society. Contrasts that still loom large in international law may be seen to be the results of historical conditions already past. That most confused and perplexed branch of our subject, the law of war domicile, which baffled even the wise and statesmanlike Conference of London, seems, nevertheless, ripe for juristic agreement. The differences which divide national interpretations in this matter are largely the result of historical traditions. They no longer represent vital political antagonisms or radical divergencies in legal systems. On the other hand, in such a matter as a trial of persons for crimes committed beyond the national jurisdiction, the establishment of a uniform system would involve more thorough-going modifications of national systems of law. Another controversy that illustrates the persistence of tradition is that concerning the immunity of private property on the sea. When England adopted her present view on this matter she had a strong navy, to be sure, but her merchant marine was far from occupying its present relative position. Now that she is the chief ocean carrier, her interest is therefore more nearly assimilated to that of the neutrals. Yet it is difficult to cut away from a long tradition, especially in a matter which seems to involve national prestige. It is the noblest function of the international jurist to show that questions which hitherto have been considered to have a strong political bearing may safely be dealt with upon the basis of legality.

In order that the work of juristic construction may be fruitful and permanent in its results, it is necessary not only that it should select its materials with care, but also that it should be animated by a just and life-giving concept of human relations. It is impossible to get positive results through negative and neutral methods.

The underlying principle of international law is not the negative one of national independence, but it lies in the positive idea of world-wide community. This is a strong statement which may arouse opposition, but rightfully understood it is by no means inimical to the fullest development of national personality. With the negative criterion in mind, we should be constantly asking ourselves the question, "How little international cooperation can we get along with, saving our courtesy to other nations?" Our international acts and treaties look like so many derogations from national sovereignty, like so many admissions grudgingly conceded. Such a point of view is, however, entirely out of sympathy with the spirit of the times, and is certainly condemned to sterility. We are beginning to view international cooperation as a strong man looks upon the varied opportunities, struggles, and triumphs of active life. He feels that his personality is expanded, his individual powers are developed far more in the stream of common action with other men than it would be in a hermit's life of isolation. So Thibet may remain an anchorite, but as for England, Germany, France, and the rest of us, we seek in the stimulating intercourse with each other that incentive which no inner motive power can alone supply.

The law of nations addresses itself primarily to the great Powers, and, though they seem to have the largest opportunity of breaking it, they are yet inherently, by their very nature, bound most to respect its principles. The ideal of a complete national life implies aims that transcend territorial boundaries. The great Powers are the heirs, jointly and mutually, of the world-state tradition of Rome and of the Middle Ages. They are the heirs, too, of the common civilization that has flown from the older centers. The justification of their existence lies in their power to establish and advance the complete life of their citizens upon the basis of humanity. Thus the very ambitions of every great world Power connect it directly with aims and policies that may truly be called humanitarian in scope and essence. Under-developed, out-of-the-way, half-civilized states feel to a lesser degree the all-pervading influence of these forces expressing themselves in international action and international law. With the great Powers it is different. The very nature of

their being demands the acknowledgment of broader relations and broader duties than their mere territorial entity would indicate. Thus the sanction of international law flows not so much from a contract arrangement for cooperation or joint action, but from the fact that the essential nature of the national state embraces all aims of humanity, which express themselves in a developing rational law created from the point of view of the common life of the civilized world.

At all times men have dreamt of a world society, but today we have actually become one great community, world-wide, responding to the same interests, thinking the same thoughts day by day. The bourses of Paris and Berlin are mutually connected with the exchanges of London and New York. Communication has reduced the world to the compass of a small state of a hundred years ago. There is a rapid interchange of ideas and discoveries. We have our common heroes and household figures. Thus the unity of human life throughout the world has been in fact established. It has also become plain that no nation is able any longer to fulfill its fundamental duties to its own citizens without arranging for international cooperation. The varied commercial facilities needed by our growing industrial life, protection against disease and crime, enjoyment of property such as copyrights and patents, full disposal over the results of universal experience in sciences and arts — all these can not be obtained without regular and constant cooperation throughout the world. In the science of international law, it is becoming clear as the day that the fundamental principle we have to deal with is the community of interest of civilized life. It is inspiring to see the growth of our great subject in compass and proportion, as it connects itself more and more with the multifarious activities of nations and mankind. Between the abstract definitions that constituted the first half of our older treatises on international law and the laws of war that were the main body of specific doctrine, there has grown up a system of principles governing in the every-day relations between states, the law of procedure in international intercourse, in claims, and in arbitration, the administrative law of the international unions, the rights of alien residents, extradition, state

responsibility, etc. — subjects which were hardly touched upon before, but which now claim our main attention. As a result of all these developments, nations no longer ask themselves, "How little can we do with decency?" but "What is the largest measure of aid and cooperation which we can give, with safety to our national interests."

Our own nation, always favored by fortune, is also at this stage in the world's development in a position of great advantage. The nation that is sure of itself, that is in a geographically protected position, can afford to take action in international matters that would be dangerous to one less fortunately situated. It has often been pointed out that our aloofness from the more special ambitions and jealousies of Europe, and the freedom of our position, make it possible for us to take a more detached and more just view of international relations, and to follow up our ideas with appropriate action. But while our distance gives us detachment and the strength of our national life gives us vigor, there is another element which makes it inevitable that the United States should be the protagonist in international cooperation. Our nation is itself the result of so many varied and distinct national elements that it is the most striking and eloquent example of the underlying unity of mankind. We, of all nations, need be least afraid that our national destiny could be overclouded or our national development retarded by a whole-hearted entry upon the constructive work of international cooperation. In the strength of youth, we welcome the inspiring strife of competition, but we are also warmed by the thought of human fellowship. Far from assuming a "better than thou" attitude, we realize the strength and freedom of our position, and with it the fact that the United States is called to advance the development of international law from a universal point of view. By entering fully into this work, we shall not retard our national growth or embarrass and curtail our sovereign power, but shall seek full play for our energies and development of our faculties in looking to the broad life of human society as our field of action. Such, as I see it, has been the spirit which has animated American diplomacy during the last decade.

It is therefore appropriate that the American Society of International Law should have undertaken the work of codifying international law. Individual American masters have already pointed the way. Field has reared his proud constructive work. Lieber has in his great War Code shown what authority reason may exercise by unfolding the logical necessities and the common-sense wisdom which form the basis of justice. The careful studies made at Newport prepared the way for the notable work achieved in the Declaration of London, while the monumental collection of Mr. John Bassett Moore is an example of the materials upon which future codifiers will have to base their work. It is in this spirit of service and usefulness to science that the present work is undertaken. It is in no sense an attempt to arrogate the functions of a world-wide science of international law. But we may well take advantage of the favored position of our nation in order to arrive at a just and detached view of international law principles in their organic relations. Such a book will have no further authority than is bestowed upon it by the careful methods and just views of the codifiers. But, if rightly done, it may become not only a landmark in science, but also an illuminating guide to the statesman seeking to make the national action for which he is responsible correspond to the highest idea of international justice, as well as to the deepest demands of our own national life. Thus would I welcome the undertaking as a part of that careful preparation which will enable our nation to take its part in the great life of the world so as to realize fully the opportunities bestowed upon us by Providence and secured for us by the wisdom and genius of our forefathers.

Mr. Root. The discussion of the President's address on *The Basis of Protection to Citizens Residing Abroad* will proceed at the meetings to be held at half-past one o'clock to-morrow afternoon and at eight o'clock to-morrow evening. Further branches of the same subject will be taken up at the meeting beginning at 10 o'clock Saturday morning.

The subject of Professor Reinsch's very admirable and delightful paper, which he has just read, and the report which Dr. Scott began to read, and a further preliminary report regarding codification of

the law will take place at the 2 o'clock meeting on Saturday afternoon.

At 10 o'clock to-morrow morning the members of the Society will be received by the President of the United States.

We will meet in the ante-room of the Executive Office, immediately to the west of the White House proper, on Executive avenue opposite the State, War and Navy building.

At 11 o'clock to-morrow morning there will be business meetings of the Executive Committee and Editorial Board.

This will conclude the exercises of the evening.

The Society thereupon adjourned until Friday, April 29, 1910.

FRIDAY, APRIL 29, 1910.

10 O'CLOCK A. M.

The members of the Society were received by the President of the United States, who addressed them as follows:

President TAFT. I am very much honored by your coming here; very glad to welcome you here; glad to know that you have an opportunity to devote this time to an avocation instead of a vocation. The remarks of Mr. Root last night were exceedingly interesting to those of us, chiefly Mr. Knox, who are attempting to bring about something practical in the way of a tribunal which shall invite submission by arbitration. To have an instrument at hand is sometimes a means of inducing its use.

I am personally a little bit more interested in another kind of an instrument that I call to your attention as international lawyers, looking at it from the standpoint of American international lawyers, and that is that Congress should put in the hands of the Executive the means by which we can perform our international obligations. We should not be obliged to refer those who complain of a breach of those obligations to governors of States and county prosecutors to take up the procedure of vindicating the rights of aliens which have been violated on American soil.

I do not think that any one, however — I will not say extreme, but however strong his view of the necessity of the preservation of State rights under the Federal Constitution — will deny the power of the government to defend, and protect, and provide procedure for enforcing the rights that are given to aliens under treaties made by the Government of the United States. Therefore, it is no excuse, it seems to me, to any one who is a supporter of the Federal Constitution at all to say that he is in favor of a strict construction of that Constitution and the preservation of State rights, in order to defend his refusal to give the central government the means of enforcing its own promises. If it has a right to make promises, I think it has a right to fulfill them, or at least ought to have power to fulfill them.

I can not suppose that the Federal Constitution was drawn by men who proposed to put in the hands of one set of authorities the power to promise and then withhold from them the means of fulfilling them.

Now, gentlemen, that is the thing that rushes into my mind the minute I see international lawyers, because it affects the international responsibilities that I for the time being have to meet. I thank you for coming here. I hope that your visit to the capital will result in something tangible in the way of recommendations that will be followed. I congratulate you on coming to a city like Washington at the time of its greatest beauty to give you new inspiration for the support of the national government.

Afternoon Session

(Friday, April 29, 1910)

The Society reassembled at 2 o'clock p. m.

In the absence of the President and the Vice-presidents, General George B. Davis, Judge Advocate General of the United States Army, a member of the Executive Council, took the chair.

The Chairman. The hour of meeting has arrived and I will ask the Society to come to order.

The subject for discussion this afternoon is *The Basis of Protection to Citizens Residing Abroad,* divided into the following topics:

1. The question of the limitation of protection by contract between the citizen and a foreign government or by municipal legislation.

2. The citizenship of individuals, or of artificial persons (such as corporations, partnerships, and so forth) for whom protection is invoked.

The speakers upon the first subdivision of this topic will be Professor G. W. Scott and Edwin M. Borchardt, Esq.

I now have the pleasure of introducing Professor Scott.

[The Committee on Publication regrets to announce that it has been informed by Professor George W. Scott that, owing to the condition of his eyes, he has been unable to revise his address, which was delivered from notes, in time for publication in the Proceedings. The members of the Society will be glad to know, however, that the address will later appear as an article in the American Journal of International Law.]

The CHAIRMAN. This very interesting discussion on the question of the limitation of protection by contract will be continued by Mr. Borchardt, and I now have the pleasure of presenting to the Society Mr. Borchardt.

ADDRESS OF MR. EDWIN M. BORCHARDT, OF WASHINGTON, D. C.,

ON

The Question of the Limitation of Protection by Contract between the Citizen and a Foreign Government or by Municipal Legislation.

The function of the modern state is to safeguard the rights and advance the interests of its subjects. International law recognizes on the part of states certain norms or attributes of government for the purpose of assuring these rights to the individual. Independence of states is one of the norms by which this end is attained; the right of a state to protect its subjects abroad is the complementary norm for this purpose. While the right of every state to exercise full sovereignty over all the individuals within its territorial limits is recognized, foreign nations retain over their subjects within such state a protective surveillance to see that their rights, as individuals, are not invaded. Though individuals are not the subjects of international law, international law imposes upon states duties which have in view their conduct towards individuals.[1] States are recognized as fully independent, with full powers of local legislation free from the interposition of a foreign government on the understanding that the rights of individuals will receive the just measure of recognition established by international law. When a state fails in the duty to accord these rights, "when it is either incapable of ruling or rules with patent injustice, the right of protection emerges in the form of diplomatic remonstrance."[2]

The broad principle of international law that when an individual establishes himself in a foreign state he renders himself subject to

[1] Heilborn, System des Völkerrechts, p. 64 *et seq.*

[2] Hall, Foreign Powers and Jurisdiction of the British Crown, Oxford, 1894, p. 4.

the entire territorial jurisdiction of that state, must be viewed in its relation to the complementary principle that the individual in question still owes allegiance to his own state and has the right to that state's protection when his rights, as measured not by the local but by the international standard, are invaded.[3]

An injury to a subject is an injury to his state.[4] The obligation to make reparation for ill-treatment of the subject is an obligation from state to state. The injured state, therefore, in bringing an international claim gives effect to its *own* right, viz., the right that no portion of its state community shall be prejudicially treated, international law fixing the standard of treatment. This legal relation between two states, however, has as its direct result the material advantage of individuals; indeed, this is the *raison d'être* of the international organization of society. What we therefore call the state's ordinary right of protection of its subjects abroad is as an international phenomenon only a manifestation of the power of the state over the individuals under its allegiance to prevent any invasion of *their* rights, and consequently of its *own* right, on the part of other states.

The states of Latin-America invoke the principle of their independence and complete territorial jurisdiction in order to restrict diplomatic interposition to its narrowest limit, that of preventing a denial of justice. They complain that private claims are presented diplomatically and frequently in the form of a threat, and advance

[3] Pillet, Recherches sur les Droits fondamentaux des Etats, Paris, 1899, p. 19 *et seq.*, particularly at p. 28.

[4] Vattel, Droit des Gens, Pradier-Fodéré's ed. 1863, Bk. 2, Ch. 6, Sec. 71, Vol. 2, p. 45 *et seq.*

Vattel is of the opinion that "whoever ill treats a citizen indirectly offends the state, which ought to protect its citizen. The sovereign of the latter must avenge his injury, compel the aggressor to accord reparation or punish him, since otherwise the citizen would not obtain the great end of civil association which is *security*." Fiore differs from this opinion; he believes that it is against good politics and governmental prudence to make the complaint of an individual a national issue, excepting where it is of a nature to engage the safety or honor of the state. Nouveau droit international public, Antoine's translation, Sec. 646, Vol. 1, p. 560. Several Latin-American states have given official sanction to Fiore's view in their legislation and their treaties.

the ultimate right of every state to pass upon all pecuniary claims against it; they contend that the European Powers too readily accede to demands for intervention on the part of their subjects, however exaggerated and doubtful they may be.[5] They insist that the claims shall be submitted to local tribunals, and by every means seek to bring about this result. The majority of the European Powers, by their refusal to enter into treaties embodying the principles contended for by Latin-America, in effect deny that the states of Latin-America have reached that stage in the administration of civilized justice which would warrant a complete and final surrender of their subjects to the determinations of the local courts.[6]

Latin-American states, in which this question of the limitation of diplomatic protection has usually arisen, have found themselves the victims of three broad classes of claims: first, claims resulting from injuries received in civil wars, inflicted both by state authorities and revolutionists; second, claims based upon acts of violence and oppression of various kinds, such as false arrest, imprisonment, and expulsion; and finally, claims arising out of contracts concluded with aliens. (The question of claims arising out of public debts

[5] Pradier-Fodéré, Traité de Droit international public, Vol. 1, Secs. 204–5; Calvo, Le droit international, Vol. 1, Secs. 204–5; Despagnet, Cours de Droit international public, 2d ed., 1899, p. 197; Revue générale du droit international public, Vol. 2 (1895), p. 341.

As early as 1852 the Venezuelan Government had endeavored to obtain an agreement among the Latin-American states not to recognize any of the claims presented by foreign governments in matters of private interest. Mr. Leocardio Guzman was charged at Lima and other capitals with a mission whose object was, it was said, to prepare an *entente* of the American states on this point. Annuaire des deux mondes, Vol. 3, 1852–3, p. 749, cited in Revue générale de droit international public, 1897, pp. 227–8.

[6] See letter of Secretary of State Gresham to Mr. Ryan, Minister to Mexico, April 26, 1893, cited in Moore's Digest of International Law, Vol. VI, pp. 270–1, to the effect that only "where complete international equality is recognized," must a country "admit the competency and the disposition of the courts of the other to do complete justice to all litigants . . . regardless of nationality."

See also opinion of M. Thiers cited in the Project presented to the Pan-American Conference of 1901 at Mexico by a delegation of several Latin-American states, session of December 4, 1901. Second International American Conference, English text, Mexico, Government Printing Office, 1902, Vol. 2, pp. 273–4. See also Moore's Digest, Vol. VI, p. 267.

is being left out of consideration, this having found a special solution in the Porter proposition at The Hague. The question, moreover, has been fully discussed at other places.) European states being for the most part unwilling to conclude treaties stipulating for complete surrender of these claims to the local courts, the Latin-American states on the authority of Calvo [7] and the general international law applied in Europe have sought other means to attain their end and secure freedom from the constant employment of diplomatic measures of coercion to which they find themselves subject.

This they have done by establishing certain limitations upon protection in their constitutions, laws, and treaties. They assert the right to do this on the legal grounds of independence, sovereignty, complete territorial jurisdiction and the fact generally recognized that individuals who establish themselves in a foreign state must submit to the local law. In this contention they are supported by well-known publicists,[8] particularly Calvo, Pradier-Fodéré, Bluntschli, Seijas, and Fiore.

The first class of claims, those arising out of injuries suffered during civil war, has given rise to a large share of these limitations. The Latin-American states assert that an injury suffered by an alien in civil war constitutes no better ground of claim than an injury

[7] *Op. cit.*, Secs. 204–5. See also on the Calvo doctrine articles by Amos S. Hershey, American Journal of International Law, Vol. I, pp. 26–34; Percy Bordwell in Green Bag, Vol. 18 (1906), pp. 377–82; Edgington, The Monroe Doctrine, 1905, pp. 218–260; Crichfield, American Supremacy, 1908, Vol. II, p. 39 *et seq.*

[8] Calvo, *op cit.*, Sec. 1280 *et seq.;* Pradier-Fodéré, *op cit.*, Sec. 402 *et seq.;* Bluntschli, Le droit international codifié, Sec. 380; Seijas, El derecho international, Vol. 3, p. 308 *et seq.;* Vol. 4, pp. 507–14, and authorities there cited; Fiore, *op. cit.*, Secs. 648–657.

Fiore believes that protection is unjustifiable when its object is to obtain for subjects abroad a privileged position. He holds that individuals settling abroad are subject to the local law (Sec. 648). He justifies protection of the interests of an individual only where the foreign government acts arbitrarily towards the alien in violating a principle of law, *i. e.*, only when it deprives aliens of the enjoyment of civil rights, etc. (Sec. 649).

Antoine, Fiore's translator, believes that when a state treats aliens in a prejudicial manner by laws which are in derogation of the usage of civilized countries of our epoch, intervention is legitimate. He thus justifies the intervention of France in 1838 in Buenos Ayres and Mexico.

received in an international war. They assert that states do not recognize in such cases any right to indemnity in favor of their own citizens and that aliens can not enjoy any such privilege in view of the fact that they submit themselves to the local law when they enter a state.[9]

The frequent occasions upon which Latin-American states have been compelled to pay indemnities for such injuries[10] has induced a number of these states to incorporate clauses in their constitutions, laws, treaties, and conventions of the Pan-American Congresses exempting themselves from all obligations to indemnify aliens for injuries suffered during civil war, not only when these are caused by insurgents,[11] but also when the injury is caused by the authorities in the suppression of the revolution.[12] European nations in sup-

[9] Calvo, *op. cit.*, Sec. 1297, and authorities there cited; Pradier-Fodéré, *op. cit.*, Secs. 204–5, 1224. Claims arising out of injuries sustained by mob violence are placed upon the same footing. Calvo, Sec. 1271; Vol. 6, Sec. 256.

[10] After the civil war in Chile in 1891, Rev. gen. dr. int. pub., 1896, p. 478; 1897, pp. 416–18. At the end of the civil war in Venezuela in 1892, Rev. gen., Vol. 2, 1895, p. 344; at the end of the civil war of 1893–4 in Brazil, Rev. gen., Vol. 4, 1897, p. 403 *et seq.;* Seijas, *op. cit.*, Vol. V, pp. 544–51; and on other occasions, Rev. gen., Vol. 2, p. 338.

[11] The clause usually reads: "Neither [citizens] nor foreigners shall have in any case the power to claim from the government indemnification for damages arising out of injuries done to their persons or property by revolutionists." See constitution of Guatemala, Art. 14, Rodriguez, American Constitutions, Vol. 1, p. 238; Salvador, Art. 46, Rodriguez, Vol. I, p. 268; Venezuela, Art. 15, Rodriguez, Vol. I, p. 201; Haiti, Art. 185, Rodriguez, Vol. I, p. 85; Honduras, Art. 142, Rodriguez, Vol. I, p. 388; Ecuador, law of August 25, 1892, Art. 12 (British and Foreign State Papers, Vol. 84, p. 645); Venezuela, law of April 16, 1903, Art. 17 (State Papers, 96, p. 647).

[12] The convention on the rights of aliens adopted at the Second Pan-American Conference at Mexico in 1901 to which the United States did not subscribe reads "the states are not responsible for damages sustained by aliens through acts of rebels or individuals and in general for damages originating from fortuitous causes of any kind, considering as such the acts of war whether civil or national, except in the case of failure on the part of the constituted authorities to comply with their duties." Sen. Doc. 330, 57th Cong., 1st Sess., p. 228.

The treaties that have been concluded between European and American states providing for exemption from responsibility in cases of civil war also deny the exemption where the state authorities have been negligent. See Alvarez, Le droit international americain, 1910, p. 122, and the following treaties:

porting claims arising out of these civil wars, regardless of whether insurgents or authorities caused the injury, take the ground that the responsibility of the state is due to a lack of diligence in preventing or suppressing uprisings. This ground could hardly be general, for "the highest interests of the state are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state." [13] Moreover, if they were negligent in fact, it would be extremely difficult to prove, and if the claims rested upon this ground alone few of them could be prosecuted to payment. As a matter of fact, the ground is advanced for plausibility only, and assuming that the states are so organized that civil commotion is only a fortuitous event and not one invited by lack of proper political organization, we must support the Latin-American states in their endeavors to be relieved from the diplomatic pressure of claims resulting from injuries suffered in the operations incident to civil war.

Germany and Mexico, Dec. 5, 1882, Art. 18, Martens' Recueil des traités, Vol. 59, p. 474.

Sweden and Norway and Mexico, July 29, 1885, Art. 21, *ibid*, Vol. 63, p. 690.

France and Mexico, Nov. 27, 1886, Art. 11, *ibid*, Vol. 65, p. 843.

Italy and Mexico, April 16, 1889, Art. 12, April 16, 1890, Art. 12, *ibid.*, Vol. 68, pp. 771 and 711.

Belgium and Mexico, June 7, 1895, Art. 15, *ibid.*, Vol. 73, p. 73.

Germany and Colombia, July 23, 1892, Art. 20, *ibid*, Vol. 69, p. 842.

Italy and Colombia, Oct. 27, 1892, Art. 21, *ibid*, Vol. 72, p. 313.

Spain and Peru, July 16, 1897, Art. 4, Olivart's Coleccion de tratados de España, Vol. 12, p. 348; Rev. gen. de droit int. pub., 1897, p. 795.

Spain and Honduras, Nov. 17, 1894, Art. 4, Olivart, *op. cit.*, Vol. 11, p. 156.

Spain and Colombia, April 28, 1894, Art. 4, Olivart, *op. cit.*, Vol. 11, p. 63.

The treaty clause limiting diplomatic interposition very often has reference to claims growing out of civil wars. Ralston, Venezuelan Arbitrations of 1903, Sen. Doc. 315, 58th Cong., 2d Sess., p. 970.

The Institute of International Law deprecates the practice of concluding treaties in which states hold themselves irresponsible for injuries arising out of civil war. Annuaire, 1900, pp. 254–6.

[13] Hall, International Law, 5th ed., 1904, p. 223. See also Fiore, *op. cit.*, Sec. 673 *et seq.;* Pillet, Les Lois de la Guerre, p. 29; Wiesse, Le Droit international appliqué aux Guerre civil, Sec. 14; Leval, La Protection diplomatique, Sec. 103; Pittard, Protection des Nationaux, 1906, pp. 281–2.

The second, and perhaps the largest, class of limitations arises out of claims based upon acts of violence or oppression in time of nominal peace. The limitations consist in denying the lawfulness of diplomatic interposition in these cases, except where there is a denial of justice; that is, they assert that every claim advanced by a foreigner, whether against an individual or against the state, must find its final settlement before the local courts, and that only in the case of a denial of justice can diplomatic interposition be entertained.[14]

[14] The law of Venezuela, April 16, 1903, which is typical of many of these provisions, reads, Art. 11 (State Papers, Vol. 96, p. 647): "Neither domiciled aliens nor those in transit have the right to have recourse to diplomatic intervention except when legal means having been exhausted before the competent authorities, it is clear that there has been a denial of justice or a notorious injustice has been done or that there has been an evident violation of the principles of international law." See also Costa Rica, law of December 20, 1886, Moore's Digest, Vol. VI, pp. 269–70; Salvador, law of September 27, 1886, Art. 39, Moore's Digest, Vol. VI, p. 267, Foreign Relations, 1887, p. 69; Ecuador, law of August 26, 1892, Art. 10, State Papers, 84, p. 645; Mexico, law of May 28, 1886, Art. 35, Legislacion Mexicana, Vol. 17, p. 474 *et seq.*, For. Rel., 1895, pt. 2, p. 1012; Guatemala, Constitution, Art. 23, Rodriguez, Vol. I, 239; Nicaragua, Constitution, Art. 11, Rodriguez, Vol. I, p. 362.

See Project presented to the Second International American Conference, *op. cit.*, pp. 274–77. Article 3 of the convention on the rights of aliens adopted at the Conference reads: "Wherever an alien shall have claims or complaints either civil, criminal or administrative, whether against a state or its citizens, he shall present his claims to a competent court of the country and such claims shall not be made through diplomatic channels except in the cases where there shall have been on the part of the court a manifest denial of justice or unusual delay, or evident violation of the principles of international law."

A provision similar to this convention has been embodied in the following treaties concluded between European and American states. Mexico appears to have had little difficulty in negotiating such treaties:

Germany and Mexico, Dec. 5, 1882, Art. 18, Martens', Recueil des traités, Vol. 59, p. 474.

Sweden and Norway and Mexico, July 29, 1885, Art. 21, *ibid*, Vol. 63, p. 690.

France and Mexico, Nov. 27, 1886, Art. 11, *ibid*, Vol. 65, p. 843.

Holland and Mexico, Sept. 22, 1897, Art. 16, *ibid*, Vol. 83, p. 188.

Germany and Colombia, July 23, 1892, Art. 20, *ibid*, Vol. 69, p. 842.

Italy and Colombia, Oct. 27, 1892, Art. 21, *ibid*, Vol. 72, p. 313.

Spain and Peru, July 16, 1897, Art. 6, Olivart's Coleccion de tratados de España, Vol. 12, pp. 348–9; Revue générale de droit int. pub., 1897, p. 795.

Spain and Colombia, April 28, 1894, Art. 6, Olivart, *op. cit.*, Vol. 11, p. 63.

Most subtle measures have been resorted to by these states to bring about the desired results. The first method is to provide that "foreigners are entitled to enjoy all the civil rights enjoyed by natives" and that "a nation has not, nor does it recognize in favor of foreigners, any other obligations or responsibilities than those established by [its] constitution and laws in favor of [its] citizens." Such provisions are a direct result of the resolutions of the Pan-American Conferences of 1889 and 1901, which were subscribed by almost all the states represented except the United States.[15] Mr. Trescott, the delegate of the United States at the Conference of 1889, foresaw that such a provision was an attempt to forestall diplomatic intervention by "an internal legislative limitation of liability," a proposition which the Unted States Government has never admitted as having force in determining the responsibility of

France and Venezuela, Nov. 26, 1885, Art. 5, Martens, Recueil, Vol. 62, p. 684.

United States and Peru, Sept. 6, 1870, Art. 37, Martens, *op. cit.*, Vol. 51, p. 107; Pradier-Fodéré, *op. cit.*, Vol. III, p. 236.

An exemption from diplomatic interposition except in cases of manifest denial of justice in some treaties, has reference only to the case of aliens taking part in civil struggles and provides that these shall be treated as nationals without right to diplomatic interposition except in cases of denial of justice.

Spain and Ecuador, May 23, 1888, Art. 3, Olivart's Coleccion de tratados de España, Vol. 9, p. 27.

Spain and Honduras, Nov. 17, 1894, Art. 3, Olivart, *op. cit.*, Vol. 11, p. 156.

Belgium and Ecuador, March 5, 1887, Art. 3, Martens, Recueil, Vol. 65, p. 741.

[15] Articles 1 and 2 of the convention on the rights of aliens adopted at the Second Pan-American Conference at Mexico, 1901–2, have been reincorporated into the constitutions and laws of the majority of the Latin-American republics. This convention provides (1) "Aliens shall enjoy all civil rights pertaining to citizens and may make use thereof in the substance form or procedure and in the recourses which result therefrom, under exactly the same terms as the said citizens except as may be otherwise provided by the constitution of each country." The reserve embodied in this article "except as may be otherwise provided by the constitution of each country" may leave the effect of the convention in some doubt. Article 2 provides, "The states do not owe to, nor recognize in favor of, foreigners, any obligations or responsibilities other than those established by their constitutions and laws in favor of their citizens." Sen. Doc. 330, 57th Cong., 1st Sess., p. 228.

See also Alvarez, *op. cit.*, pp. 234–5; Calvo, *op. cit.*, Vol. 6, Sec. 256, p. 331; For. Rel., 1893, pp. 731–4.

The Third Pan-American Conference at Rio de Janeiro, 1906, did not renew the

states to one another.[16] This limitation is, of course, merely supplementary to a general provision in every state system in Latin-America that foreigners must submit themselves for all purposes to the local law.[17] Some states have in one portion of their laws governing foreigners[18] provided that the alien has the right "to appeal for the protection of his country by diplomatic means according to the precepts established by the constitution." This apparently liberal provision is subsequently modified in the same law by a clause that such diplomatic intervention is only possible in cases of denial of justice after the ordinary means provided by the laws have been exhausted, and then follows a special legislative definition of the term "denial of justice" in which it is provided that a "denial of justice" is understood when the "judicial authority refuses to make

convention on the right of aliens adopted at the Mexican Conference in 1901, but seems to have left the matter to be governed by the principles of international law. Alvarez, *op. cit.*, p. 235.

The following constitutions embody this provision:

Colombia, Art. 11, Rodriguez, Vol. II, p. 321.

Costa Rica, Art. 12, Rodriguez, Vol. I, p. 328.

Ecuador, Art. 37, Rodriguez, Vol. II, p. 283.

Honduras, Art. 11, Rodriguez, Vol. I, p. 362.

Nicaragua, Arts. 7–8, Rodriguez, Vol. I, p. 301.

Panama, Art. 9, Rodriguez, Vol. I, p. 394.

Paraguay, Art. 33, Rodriguez, Vol. II, p. 388.

The following laws contain a similar provision:

Guatemala, Law of Feb. 21, 1894, Art. 47, State Papers, Vol. 86, p. 1281 *et seq.*

Mexico, Law of May 28, 1886, Art. 30, Foreign Relations, 1895, pt. II, p. 1012; Legislacion Mexicana, Vol. 17, p. 474 *et seq.*

[16] Report on the Uniform Code of International Law at the First Pan-American Conference, Sen. Ex. Doc. 224, 51st Cong., 1st Sess., pp. 28, 29: Mr. Fish, Secretary of State, to Mr. Foster, Minister to Mexico, July 15, 1875, Moore's Digest, Vol. VI, p. 310. See Mr. Bayard's statement with reference to the Venezuelan law of February 14, 1873, Moore's Digest, Vol. VI, p. 745; see also Foreign Relations, 1887, p. 99; 1888, p. 491; 1893, pp. 731–2.

[17] Salvador, Constitution, Art. 45, Rodriguez, Vol. I, p. 268: Cuba, Constitution, Art. 10, Rodriguez, Vol. II, p. 115; Salvador, Law of September 29, 1886, Art. 38, State Papers, Vol. 77, p. 116; Colombia, Laws of November 28, 1888, Art. 9, State Papers, Vol. 79, p. 167 *et seq.*

[18] Honduras, decree of April 10, 1895, Art. 27, State Papers, Vol. 87, pp. 703–4. Salvador, law of September 29, 1886, Art. 29, State Papers, Vol. 77, pp. 116–18. Guatemala, decree of February 21, 1894, art. 42, State Papers, Vol. 86, p. 1281 *et seq.*

a formal declaration concerning the main issue or any of the incidents in the case," and that a "denial of justice" can not be alleged no matter how iniquitous or contrary to law the decision may be.[19] In other words, if a decision has been made in the case, "denial of justice" can no longer be alleged. It is hardly to be supposed that any foreign state, even among those which have concluded treaties with the Latin-American states providing for a renunciation of diplomatic interposition in all cases except denials of justice, would consider themselves bound by a municipal legislative interpretation of the term "denial of justice." Great Britain and the United States with one exception[20] have not only declined to conclude treaties renouncing diplomatic interposition, but have expressly protested against any articles of local law which purport to limit or restrict the diplomatic interposition of the government.[21]

[19] The clause reads (Honduras, decree of April 10, 1895, State Papers, Vol. 87, pp. 705–6, Art. 34): "Aliens may not have recourse to diplomatic intervention except in case of denial of justice, and after having in vain appealed to the ordinary means provided by the laws of the Republic."

Article 35 provides: "Denial of justice is understood when the judicial authority refuses to make a formal declaration concerning the principal matter or any of the incidents of the case. * * *

"Consequently, by the mere act of the judge giving a decision or sentence, in any sense, denial of justice cannot be alleged, although it may be alleged that the decision is iniquitous or contrary to law."

See also, Salvador, law of September 29, 1886, Arts. 39 and 40, State Papers, Vol. 77, pp. 116–18; Guatemala, decree of February 21, 1894, Art. 42, State Papers, Vol. 86, p. 1281 *et seq.*

Brief of Mr. Penfield in case of Salvador Commercial Co. (U. S.) *v.* Salvador, For. Rel., 1902, p. 845.

[20] Treaty between United States and Peru, September 6, 1870, Art. 37, Pradier-Fodéré, *op. cit.*, Vol. III, p. 236; Martens, *op. cit.*, Vol. 51, p. 107.

[21] Great Britain and the United States, while upholding the duty of their injured subject abroad to appeal to the local court for redress, have never hesitated to interpose in his behalf when they deemed a foreign court in any way unworthy of confidence. Lord Palmerston in the House of Commons, June 25, 1850; Ackerman, Attorney-General, 1871, 13 Atty.-Gen. Op., p. 547, cited in Moore's Digest, Vol. VI, pp. 681–2.

In some cases of oppression resort to the judicial remedy may be dispensed with, diplomatic interposition being immediate. Mr. Bayard, Minister to Mexico, July 20, 1885; 2 Wharton's Digest, p. 685, and other cases there cited.

For attitude of Germany, see Foreign Relations, 1902, p. 844, Moore's Digest, Vol. VI, p. 300.

Another general provision by which it is sought to limit state responsibility is that the public official causing the injury shall be personally sued and the state can not be made a party to the suit.[22] How limited the redress of the individual under such circumstances must be, is apparent on its face.

Perhaps the most drastic attempt to limit diplomatic interposition was incorporated in the decree of Ecuador of July 17, 1888,[23] in which the nation was relieved from responsibility to aliens for all damages resulting from war, civil or international, from all military operations or measures adopted for the restoration of public order, and from "measures adopted by the government towards natives or foreigners involving their arrest, banishment, or imprisonment * * * whenever the exigencies of public order * * * require such action." In this case a collective note was addressed by the diplomatic body at Quito to the Minister of Foreign Affairs in which they stated that they would act on the principle that the internal legislation of a state can not alter international law to the prejudice of the subjects of other nations.[24]

Some states have, furthermore, sought to avoid diplomatic interposition by provisions establishing a court or board of commissioners which was to take jurisdiction of claims against the state presented

For United States protest, see Foreign Relations, 1887, pp. 78, 99, Moore's Digest, Vol. VI, pp. 267, 271; for Great Britain's protest, December 7, 1887, and April 17, 1888, against the law of Salvador of September 29, 1886, see State Papers, Vol. 77, p. 116.

[22] The constitution of Hayti of October 9, 1889, Art. 185, Rodriguez, *op. cit.*, Vol. II, p. 85, reads: "The injured parties, however, shall have the right if they choose to prosecute before the courts according to law the individuals recognized as authors of the wrongs perpetrated and seek in this way the proper legal reparation." See also Ecuador, constitution, Art. 39, Rodriguez, Vol. II, p. 284; Salvador, constitution, Art. 38, Rodriguez, Vol. I, p. 294; Bolivia, constitution, Art. 111, Rodriguez, Vol. II, pp. 441–2; Venezuela, decree of February 14, 1873, Art. 3. See also Tchernoff, Protection des Nationaux, 1899, p. 292; Calvo, *op. cit.*, Sec. 1263.

[23] Recopilacion de leyes de Ecuador (Noboa), Vol. 2, pp. 124–5.

[24] State Papers, Vol. 79, pp. 166–7; Alvarez, *op. cit.*, p. 121. The United States in a series of notes declared that they could "never acquiesce in any attempt on the part of [Ecuador] to use such a statute as an answer to a claim which this government had presented." For Rel., 1881, pt. 1, pp. 490–2.

both by subjects and foreigners. The harsh conditions which often accompany the presentation of a claim to such a board might easily involve more danger and loss to the individual bringing the claim than if he had never made it known.[25] Finally, it is sometimes provided that the bringing of a claim which would prejudice the

[25] Venezuela, decree of February 14, 1873, Recopilacion de leyes, Vol. 5 (1870–3), pp. 241–3; State Papers, Vol. 74, pp. 1065–67. Aroa Mines (Gt. Brit.) *v.* Venezuela, February 13, 1903, Ralston, Vol. I, p. 350 *et seq.* The Venezuelan decree of 1873 provides that if the claim appears to have been exaggerated the claimant shall forfeit the entire claim and is in addition liable to a fine and to imprisonment from three to twelve months; if the claim appears to be ill-founded the claimant is liable to a still heavier fine or to imprisonment of from six to twenty-four months (Art. 8). The law of April 16, 1903, Art. 12 (St. Pap., Vol. 96, p. 647 *et seq.*) compels the alien to subscribe a declaration binding himself to abide by the provisions of the decree of 1873 under penalty of expulsion. See also Rev. gen. dr. int. pub., Vol. 2 (1895), p. 344 *et seq.*, and article by Daguin, "Les etrangers au Venezuela," Rev. du dr. int. privè, Vol. 1 (1905), p. 277 *et seq.*

It is to be noted that occasionally Latin-American governments have established courts to consider claims arising out of injuries inflicted upon foreigners which are apparently free from these hazardous limitations. Thus Colombia, by a law of August 31 and October 11, 1886, State Papers, Vol. 77, p. 810, as amended February 15, 1887 (State Papers, Vol. 78, p. 53), provided that loans, supplies, expropriations or other losses even when under circumstances caused by rebels shall be compensated for. See decree of Colombia, July 30, 1878, State Papers, Vol. 69, p. 376; Guatemala, law of February 21, 1894, Art. 81, State Papers, Vol. 86, p. 1281 *et seq.*

As in most state systems founded upon Roman law, the state generally in Latin-America can be sued. It is expressly provided for in the following constitutions and laws:

Argentine constitution, Art. 100, Rodriguez, Vol. I, pp. 127–8.

Brazil constitution, Art. 60, *ibid*, Vol. I, p. 155.

Colombia constitution, Art. 151, *ibid*, Vol. II, p. 355.

Costa Rica constitution, Art. 46, *ibid*, Vol. I, p. 332.

Venezuela constitution, Art. 14, *ibid*, Vol. I, p. 225.

Brazil, law of November 20, 1894, Collecçao das Leis, 1894, Vol. 1, p. 16 *et seq.*

Colombia, law of August 31, 1886, Arts. 1, 2, State Papers, Vol. 77, p. 807.

Venezuela, law of April 16, 1903, Art. 16, State Papers, Vol. 96, p. 647 *et seq.*

Guatemala, law of February 21, 1894, Art. 81, State Papers, Vol. 86, p. 1286 *et seq.*

The supreme court is usually given jurisdiction of suits in which the government is a party.

nation, or any recourse to diplomatic protection, involves the expulsion of the foreigner.[26]

A third class of claims in the Latin-American states arises out of contracts made between the government and an alien. Since 1886 many of the Latin-American states have incorporated into their constitutions and laws a provision that every contract shall bear the clause that the foreigner "renounces all right to prefer a diplomatic claim in regard to rights and obligations derived from the contract," or else that "all doubts and disputes" arising under it "shall be submitted to the local courts without right to claim [the] diplomatic interposition" of the alien's government.[27]

While the United States has always considered that a citizen is not competent "to divest himself of any part of his inherent right to protection or to impair the duty of his government to protect him," [28] some governments — the United States and Italy [29] among others — have generally followed the course of declining their diplomatic interposition *in ordinary cases* arising out of contract, so that frequently this clause renouncing diplomatic protection is merely confirmatory of the attitude assumed by states of injured aliens.[30] However, there have been so many cases of confiscatory breaches of contract

[26] Nicaragua, constitution, Art. 11, Rodriguez, Vol. I, p. 302; Honduras, constitution, Art. 15, *ibid*, Vol. I, p. 362; Honduras, law of April 10, 1895, Art. 37, State Papers, Vol. 87, p. 707.

[27] Ecuador, constitution, Art. 38, Rodriguez, Vol. II, p. 283, Rev. gen. dr. int. pub., Vol. 4, 1897, p. 228. See also Ecuador, law of August 25, 1892, Art. 14, State Papers, Vol. 84, p. 646; Venezuela, constitution, Art. 124, Rodriguez, Vol. I, pp. 230–1; Colombia, law of November 26, 1888, Art. 15, State Papers, Vol. 79, p. 167 *et seq.*

See letter of Secretary of State Bayard to Mr. Straus, Minister to Turkey, June 28, 1888, Foreign Relations, 1888, pt. 2, p. 1599, Moore's Digest, Vol. VI, pp.. 296–7, with reference to a law of Turkey of January 10, 1888, Art. 5, providing that foreigners shall not be permitted to set up printing offices in Turkey unless by formal declaration they renounce the privileges and immunities of foreigners.

[28] Moore's Digest, Vol. VI, pp. 296–7.

[29] For the policy of Italy see Rev. gen. dr. int. pub., Vol. 4 (1897), pp. 405–6, citing notes of Italian Minister of Foreign Affairs.

[30] Moore's Digest, Vol. VI, p. 705 *et seq.* Statement of Mr. Hay, Secretary of State, in the case of Salvador Commercial Company (U. S.) *v.* Salvador, Moore's Digest, Vol. VI, pp. 731–2, For. Relations, 1902, pp. 839, 871; Mr. Olney, Secre-

by the Latin-American executives and legislatures and so many other infractions of rights derived from ordinary contracts, that reasons for interposition founded upon tort are not hard to find. International tribunals have in many cases of arbitrary annulment of concession-contracts relieved claimants from stipulations providing for reference of all matters of difference under the contract to the local courts.[31] Where the denial of justice was proved, these tribunals have generally allowed claims arising out of violations of contract rights.[32]

International arbitration tribunals and ministries of foreign affairs have declined to consider the *government* of the injured alien bound by such contractual renunciation of diplomatic interposition on the part of the individual. By such a clause he can not contract away the right of his government, which is absolutely independent of his own right, though traced through it.[33] Mr. Bainbridge, American Commissioner in the case of Rudloff (U. S.) *v.* Venezuela,[34] confirmed the opinion of Mr. Commissioner Little in the United States and Venezuelan Commission of 1890 in the Flanagan Case,[35] that such a provision in contracts between a sovereign and

tary of State, in claim of North and South American Construction Company *v.* Chile, Moore's Digest, Vol. VI, pp. 728–9, For. Relations, 1895, pt. 1, p. 83; Calvo, *op. cit.*, Vol. VI, Sec. 366, p. 351; McMurdo's case (U. S.) *v.* Portugal, Moore's Arbitrations, Vol. II, pp. 1865–99, Moore's Digest, Vol. VI, pp. 727–8, 297.

[31] Moore's Digest, Vol. VI, p. 295, and cases there cited. See also Milligan (U. S.) *v.* Peru, December 4, 1868, Moore's Arbitrations, Vol. II, pp. 1643–4.

[32] Moore's Digest, Vol. VI, p. 718, and authorities there cited.

[33] Foreign Relations, 1902, p. 844; Wharton's Digest, Vol. II, Sec. 242, p. 695; Moore's Digest, Vol. VI, p. 294; Martini (Italy) *v.* Venezuela, February 13 and May 7, 1903, Ralston, Vol. I, p. 819; other cases cited in Moore's Digest, Vol. VI, p. 307.

The decisions, however, are by no means uniform. See opinion of Plumley, Umpire, in French Company of Venezuela Railroad (France) *v.* Venezuela, February 19, 1902, Sen. Doc. 533, 59th Cong., 1st Sess., p. 445; Day & Garrison (U. S.) *v.* Venezuela, December 5, 1885, Moore's Arbitrations, Vol. IV, p. 3548; Orinoco Steamship Company (U. S.) *v.* Venezuela, February 13, 1903, Barge, Umpire, Ralston, Vol. I, pp. 90–91.

[34] Rudloff (U. S.) *v.* Venezuela, February 13, 1903, Ralston, Vol. I, pp. 180–187.

[35] United States *v.* Venezuela, December 5, 1885, opinions of the Commission, Washington, 1890, p. 451.

an alien is not consonant with sound public policy, and he added that these constitutional provisions and legislative enactments are in contravention of the law of nations and "*pro tanto* modifications or suspensions of the public law beyond the competence of any single power."

The United States has probably been responsible for the incorporation into the constitutions of Cuba [36] and Panama [37] of the provision that obligations of a civil nature arising out of contracts or other acts or omissions shall not be nullified or impaired by either the legislative or the executive power.

Another general means of forestalling diplomatic interposition is to provide measures making it difficult for the alien to assert his foreign nationality and bringing him within the optional power of the state to claim him as its own citizen. Such measures are apparent in the provision of Article 69 of the constitution of Brazil,[38] reincorporating the decree of December 14, 1889, providing that all aliens who within a certain period failed to register their foreign nationality before certain administrative boards would lose their right of alienage.[39] Spain (in Cuba),[40] Mexico,[41] Salva-

[36] Constitution of February 21, 1901, Art. 13, Rodriguez, Vol. II, p. 115.

[37] Constitution of February 13, 1904, Art. 30, *ibid*, Vol. I, p. 398.

[38] Rodriguez, Vol. I, p. 158.

[39] Salvador's constitution, Art. 48, Rodriguez, Vol. I, p. 268, provides that the alien who accepts office with salary becomes a citizen. It is also generally provided that a person accepting public office becomes thereby a citizen.

The American republics generally reserve the right of treating aliens who take part in their civil struggles as their own nationals. See treaties of Germany and Colombia, July 23, 1892, Art. 20, Martens, Vol. 69, p. 842; Spain and Honduras, November 17, 1894, Art. 3, Olivart's Coleccion, Vol. 11, p. 156; Spain and Colombia, April 28, 1894, Art. 4, Olivart, *ibid*, Vol. 11, p. 63; Italy and Colombia, October 27, 1892, Art. 5, Martens, Vol. 72, p. 310. See also debate in German Reichstag, January 21, 1894, cited in Rev. gen. dr. int. pub., Vol. 2 (1905), pp. 343–4.

Corporations doing business in the state are often regarded as national corporations. Colombia, constitution, Art. 14, Rodriguez, Vol. II, p. 321; Venezuela, constitution, Art. 124, Rodriguez, Vol. I, p. 231; Salvador, law of September 29, 1886, Art. 5, State Papers, Vol. 77, p. 116.

[40] Decree of February 15, 1896, Moore's Digest, Vol. VI, pp. 316–17; Vol. III, pp. 794–95.

[41] Decree of March 16, 1861, Legislacion Mexicana, Vol. 9, p. 123; decree of

dor,[42] and other states [43] have at different times sought to establish these regulations for the matriculation of foreigners as conditions precedent to diplomatic interposition by their governments. The United States, however,[44] has always taken the attitude that while their subjects in foreign states must comply with reasonable local requirements of registration, "the omission to do so can not vitiate their right to protection as citizens by their own government in case of need." France has likewise [45] protested against any limitation upon its right to protect its citizens by such provisions of local legislation.

The conflicts arising out of the attempt to limit diplomatic interposition have been especially prominent in Latin-America. We have surveyed the various measures, legislative and otherwise, to which these states have resorted in order to forestall the interposition of foreign governments on behalf of their subjects. We have examined the motives which have induced the establishment of these limitations, and the effect given them by foreign governments and international tribunals.

On the whole, it may be said that the Latin-American states, by such legislative limitations upon the right of diplomatic interposition, have probably not relieved themselves from what they consider one of their greatest sources of evil, the pressure of foreign claims.

On the contrary the states of Latin-America have suffered greater prejudice in the way of lost confidence by the enactment of such drastic laws — devices so contrary to sound principles of international law — than would have resulted from the complete abandon-

December 6, 1866, *ibid*, Vol. 9, p. 748; decree of July 28, 1871, *ibid*, Vol. 11, p. 540; decree of April 6, 1872, *ibid*, Vol. 12, p. 173. These decrees were repealed by the law of May 28, 1886, *ibid*, Vol. 17, p. 474, by which optional registration was substituted for compulsory matriculation. See Moore's Digest, Vol. VI, pp. 309–14, and authorities there cited.

[42] Law of September 29, 1886, Arts. 21–28, State Papers, Vol. 77, pp. 116–22; Moore's Digest, Vol. VI, pp. 314–5, Vol. III, pp. 791–3.

[43] Honduras, decree of April 10, 1895, Arts. 23–26, State Papers, Vol. 87, pp. 703–4. Guatemala, decree of February 21, 1894, Arts. 35–41, State Papers, Vol. 86, p. 1281 *et seq.;* Venezuela, law of April 16, 1903, Art. 12, State Papers, Vol. 96, p. 647 *et seq.*

[44] Moore's Digest, Vol. VI, pp. 316–17.

[45] Journal du droit international privé, 1890, pp. 76–77.

ment of their rights to the recognized principles of international law and the submission of their case to the public opinion of the society of states. The remedy lies in one direction only. When the Latin-American states raise the standard of their judicial organization so that the courts will perform their international duty as measured by the standard of international law, the continued diplomatic pressure of foreign claims will cease. Until the administration of justice in these states itself induces that confidence which will relieve them from burdensome diplomatic claims, foreign governments will no more than heretofore consider themselves hampered by the provisions of local legislation or by the renunciation of protection by the contract of their subject.

The CHAIRMAN. We now pass to the second phase of the discussion of the general subject of *The Basis of Protection to Citizens Residing Abroad,* which is:

The citizenship of individuals, or of artificial persons (such as corporations, partnerships, and so forth) for whom protection is invoked.

I now have the pleasure of introducing to the Society Professor Raleigh C. Minor, of Virginia.

ADDRESS OF PROF. RALEIGH C. MINOR, OF THE UNIVERSITY OF VIRGINIA,

ON

The citizenship of individuals, or of artificial persons (such as corporations, partnerships, and so forth) for whom protections is invoked.

Gentlemen of the American Society of International Law: I have been flattered by the invitation you have extended me to read this paper. Its demerits I beg you will ascribe, in part at least, to your own courtesy and kindness in affording me the opportunity and privilege of addressing this distinguished body.

In that fabulous state of nature, so glowingly depicted by some writers on the Theory of Government, when man roamed the world at will, subject to no restrictions save those imposed by his own

unquickened conscience or his neighbor's bludgeon, when the obligations of citizenship as well as the protection afforded by government were nascent or nonexistent, there were perhaps compensations that we, of a later age, do not fully appreciate. There were no taxes or millinery bills to pay, no elections, no windmills or trusts to overthrow, no political speeches or comic supplements of Sunday newspapers to read, nor discourses to be patiently heard by learned societies.

But this state of nature had its disadvantages also. True, pleasure and profit might be derived from robbing a weaker neighbor of his hard-earned hoard of chestnuts, huckleberries, fig-leaves, or whatever our semi-simian forbears were used to squander upon their tables and toilettes, but the pleasant pastime was subject to the inconvenient consequence that a stronger might perform the same friendly service for the robber, with none to stay his rapacious hand.

Nor, in the more probable early processes of mankind — the family and tribal stages — may we expect to find the correlative ideas of protection and citizenship highly developed.

So far as we can now discern from the dim records of an ancient past, the once powerful kingdoms of Babylon and Egypt arose and sank to their setting, without developing fully these conceptions. Based as these governments were upon the selfishness and despotism of the rulers and the ignorance and weakness of the ruled, there was scant room for the growth of that mutual sense of moral obligation, whereby rulers are induced to regard themselves as trustees of power for the welfare and happiness of their people, and the people to look upon themselves as the support and mainstay of their government.

Upon such meat does patriotism feed. In proportion as a government selfishly pursues its own ends to the detriment of its people's interests, in like ratio will love of country and other civic virtues decline among the citizens. This is one of the great lessons taught in the rise and fall of the Roman Empire, and in the loosened ties of allegiance and protection so prominently featured in the history of Europe during the Middle Ages.

Out of the dark and dreary womb of that gloomy period the

European states emerged, struggling in the throes of a new birth, to be confronted with the great problems induced by the revival of learning, the invention of printing, and the discovery of America, to be followed in due time by those yearnings after freedom — moral, mental, and physical — destined to wade through slaughter to their culmination, causing the overthrow and execution of more than one monarch, and only reaching their fuller fruition in our own day.

These various influences are readily traceable in the origin and growth of international law, and perhaps at no point more clearly than in the doctrines of allegiance, citizenship, and the governmental protection due in return for allegiance. The despotic and tyrannical principle of indelible allegiance has now almost universally given place to the only doctrine tolerable to freemen — that of a reasonable right of expatriation whenever the interest or choice of the individual shall dictate such a course. We, of America, may be pardoned an emotion of pride that our own government should have taken so large a part in this reform.

Not only do modern states recognize the duty to protect their citizens at home against the rapacious hand of power, even the ill-directed power of government itself, but they recognize the equal duty to protect their people, when abroad, against the oppressive acts of foreign governments and officials. I wish to invite your attention, as briefly as I can, to the nature of that citizenship, to insure justice to the holders of which our government will advance, if need be, into the bloody jaws of war itself.

The protection thus afforded need not be, and is not, altogether confined to persons answering the strict definition of citizens, in the full sense of the word. For example, as we shall presently see, corporations incorporated in the United States, though not in strictness citizens, are protected by the government against foreign aggression, just as if they were actually citizens. Such persons may be conveniently termed *quasi-citizens.*

The citizen of the United States owes political allegiance to the country, and if he levies war against it or adheres to its enemies, giving them aid and comfort, he is guilty of treason. The *quasi-*

citizen owes no such political allegiance, and can not be guilty of treason.

Again, the constitutional provision, prohibiting any state of the Union "to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," applies only to persons who are strictly *citizens,* and not to the *quasi-citizens* just alluded to.

While, therefore, the citizen and the quasi-citizen may be equally entitled, by favor of government, to invoke its protection against the aggressions of foreign states, it does not follow that the government either intends or has the power to place them on an equal footing in all other respects.

Let us then first inquire, who are citizens of the United States in the strict sense of the word to whom attach all the burdens as well as the privileges of citizenship? — and, second, who are those quasi-citizens who, though entitled as against other nations to such protection as our government may think proper to accord, yet can not claim all the rights and privileges of citizenship, nor be burdened with all its obligations?

I. *Citizenship of the United States.*

This subject must be discussed with reference to two distinct periods in our history, the first, from the inception of the Constitution to the passage of the Fourteenth Amendment in 1868; the second, from the passage of the Amendment to the present.

The original Constitution had conferred upon Congress the express power to "establish an uniform rule of naturalization," and had declared that "no person except a natural-born citizen * * * shall be eligible to the office of President." It had also, in defining the eligibility of Senators and Representatives in Congress, declared that they shall have been "citizens of the United States" for a prescribed period. Thus, the Constitution itself recognized that there was a classification of citizens into natural-born and naturalized, but it nowhere defined who should be deemed citizens.

Where then was the government to look for a definition? The natural answer, in view of our sysem of municipal law, was to con-

sult the common law of England, to which we had been subject as Colonies, and to modify that by such legislative acts of Congress as might be needful to adapt it to our conditions. At least this was what was actually done, and the right of Congress, under the original Constitution, thus to modify the common-law doctrine as it might see fit, has never been seriously questioned.

The rule of the common law is that citizenship turns upon the place of birth, and that one born within the jurisdiction, even though of alien parents, is a citizen by birth, or, as the Constitution expresses it, a natural-born citizen; and this rule has been very generally recognized and enforced by all the departments of the government. *United States* v. *Wong Kim Ark,* 169 U. S. 655 *et seq.; Lynch* v. *Clarke,* 1 Sandf. Ch. (N. Y.) 583; 9 *Ops. Atty.-Gen.* 373; 10 *Id.* 382, 394.

But Congress thought proper to extend this definition, and as early as 1790 enacted that "the children of citizens of the United States, that may be born beyond the sea or out of the limits of the United States, shall be considered as natural-born citizens." 1 *Stat. at L.* 104. This act, however, was substituted in 1795 by another, in which the words "natural-born citizens" are replaced by the single word "citizens" — a change retained in the act of 1802 and in the act of 1855, which is the one now found on the statute books (*U. S. Rev. Stats.,* § 1993, *U. S. Comp. Stats.,* p. 1268) indicating the legislative intent to recede from the position that such persons are to be classed as natural-born, and to constitute them naturalized, citizens, and they are so classed by the Supreme Court in *United States* v. *Wong Kim Ark,* 169 U. S. 687, 688, 702–703. The question is one of practical interest since, under the Constitution, only a natural-born citizen can aspire to be President of the United States.

Furthermore, Congress, in the exercise of its constitutional power to establish an uniform rule of naturalization, enacted a general naturalization law in 1790, since frequently amended, providing that any alien, being a free white person, might be naturalized, and prescribing the procedure by which this result might be accomplished. *U. S. Rev. Stats.,* § 2165 *et seq., U. S. Comp. Stats., p.* 1329 *et seq.*

Another rule adopted by Congress is that the infant children, dwelling here, of duly naturalized aliens, shall be deemed citizens. *U. S. Rev. Stats.*, § 2172, *U. S. Comp. Stats.*, p. 1334.

Prior to 1855 an alien woman, marrying a citizen of the United States, did not by virtue of the marriage become a citizen, but remained an alien unless naturalized under the general laws. *Shanks* v. *Dupont*, 3 Pet. 242. But by the act of Congress of that year, with its later amendments, such a wife shall be deemed a citizen, provided she might herself be lawfully naturalized, that is, provided she were free white or (later) of African nativity or descent. *U. S. Rev. Stats.*, § 1994, *U. S. Comp. Stats.*, p. 1268; *Kelly* v. *Owen*, 7 Wall. 496; *Broadis* v. *Broadis*, 86 Fed. 951; *Kane* v. *McCarthy*, 63 N. C. 299.

Still another mode of naturalization may occur upon the admission by Congress of a new State into the Union, whereby in general all residents who have been permitted to share in the formation of the new State become citizens of the United States, even though they be aliens who have never complied with the general naturalization laws. *Boyd* v. *Nebraska*, 143 U. S. 135.

One other mode of naturalization may be mentioned, peculiar because of the fact that it is not the result of acts of Congress, but is accomplished under the treaty power, vested in the President and Senate. When, by treaty of peace or of cession, certain territory has come under the jurisdiction of the United States, the inhabitants of that territory are usually by treaty stipulation made citizens *ipso facto*.[1]

This is a brief summary of the modes whereby citizenship of the United States might have been created prior to the passage of the Fourteenth Amendment. It will be noted that during this period Congress exercised, as an unquestioned right, the power of defining

[1] A prominent exception to this general rule is found in the treaty of peace of 1898 between Spain and the United States, applicable to the residents of Porto Rico and the Philippine Islands, wherein it is provided that Spanish subjects, natives of Spain and resident in the islands, might retain their allegiance to Spain. (See Insular Cases, 182 U. S. 1. But this does not include Spanish corporations, organized prior to the cession, and doing business in the islands. Martinez v. Associacion de Senoras, 213 U. S. 20.)

who should be citizens, in the absence of any definition of the term in the Constitution itself; or, perhaps, it would be more accurate to say that in none of the cases in which Congress undertook to determine who should be citizens was its power to pass the particular acts questioned.

We now come to consider what changes, if any, have been wrought in this Congressional power by the Fourteenth Amendment of 1868. Its importance in this discussion is due to the fact that it defines, as the original Constitution did not, who shall be citizens, both of the United States and of the States, declaring that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This is not the occasion to consider the causes leading to the adoption of this clause of the Amendment. Suffice it to say that the public mind had been greatly disturbed over the question, who were, and who were not, citizens of the United States and of the several States, not only in relation to the lately emancipated negroes, but also with respect to the inhabitants of the District of Columbia and the territories, as well as others whose status under the original Constitution was doubtful.

This constitutional provision evidently accomplishes one of two things. It either sets forth a clear and comprehensive definition of citizenship, furnishing the sole criterion in all future cases by which the citizen of the United States and also the citizen of the State is to be measured, anything in any act of Congress or State law or constitution to the contrary notwithstanding, which is the view expressed in a *dictum* of the Supreme Court in the *Slaughter-House Cases,* 16 Wall. 72–73; or else it is to be regarded merely as a constitutional declaration that certain persons shall be citizens of the United States and of the States wherein they reside, without intending to deny to Congress or to the States the rights previously possessed to determine citizenship in other cases for themselves, as they might see fit. The latter view, in part at least, is also supported by *dicta* of the Supreme Court in the case of *United States* v. *Wong Kim Ark,* 169 U. S. 676, 687–688.

I do not purpose to discuss here the relative merits of these two views of the scope of the Amendment, but assuming that announced in the *Slaughter-House Cases, supra,* to be correct, and that the Amendment contains a complete definition of citizenship of the United States, and also of the States, which neither Congress, nor any other department of the government, nor a State, is competent either to enlarge or restrict, I shall consider the effect this view would have upon the various cases already mentioned, whereof citizenship of the United States might have been predicated prior to the Amendment.

It will be observed that the definition, if such it be, preserves the classification into natural-born and naturalized citizens, demanding of the natural-born that he be born in the United States, and of both that they be subject to the jurisdiction thereof.

Two conditions are required for the natural-born citizen: (1) that he be born in the United States; and (2) that he be subject to the jurisdiction thereof. The first of these is a mere question of fact, of which nothing need be observed save that it is provable like any other fact, and that it forever lays to rest the contention that a child born in a foreign country of American parents may be deemed a natural-born citizen. See *United States* v. *Wong Kim Ark,* 169 U. S. 687, 688, 702–703. But the second condition, that he be subject to the jurisdiction, involves some delicate and important points of international law and constitutional construction.

The phrase, "subject to the jurisdiction," may refer to the obligation of political allegiance, or it may refer to the duty of obedience to the country's laws, or both.

Under any interpretation of the phrase, it is clear that a child born in the United States, whose parents are citizens of this country, is subject to the jurisdiction, and therefore answers every requirement of a natural-born citizen. *Minor* v. *Happersett,* 21 Wall. 162, 166–168.

On the other hand, under the fiction of extraterritoriality, as recognized by international law, it is equally manifest that a child, though born ostensibly in the United States, if he be born in a foreign legation of parents belonging to the embassy, or on a foreign

public vessel, or of alien enemies in hostile occupation of American soil, is not subject to the jurisdiction of this country in either sense of the term. Neither parents nor child owe to this government political allegiance nor the general duty to obey its laws, and hence the child does not answer the constitutional definition of a citizen of the United States. *United States* v. *Wong Kim Ark,* 169 U. S. 682 *et seq.*

Again, the relations of members of the Indian tribes to the federal government are such that they can not properly be said to be subject to its jurisdiction. Though actually situate within the limits of the United States, the Indian tribes occupy the position of alien, though dependent, nations, with whom the government is competent to make treaties, and who, while compelled to keep the peace, are in the main subject to their own tribal laws and customs. A child of Indian parents in tribal relations, though born in the United States, is not subject to the jurisdiction, and hence is not a natural-born citizen. *Elk* v. *Wilkins,* 112 U. S. 99–103.

But what shall we do with the child born in this country of alien parents domiciled here, or, still worse for our peace of mind, of aliens here temporarily only? The political allegiance of these strangers, especially the latter, is in the main due to their own country, not to ours, and their obligations to this country are for the most part fully discharged if they render obedience to its laws. Does this constitute them "subject to the jurisdiction" so far as to cause their children, born on American soil, to be deemed natural-born citizens of the United States?

In the case of the child born here of aliens domiciled in this country, the Supreme Court has decided that he is a citizen, even though the parents, after his birth, take him back to their native country. In *United States* v. *Wong Kim Ark,* 169 U. S. 649, a child, born here of domiciled Chinese parents, was held a citizen, and as such entitled to enter the United States from China, despite the Chinese Exclusion Act.

And perhaps, since this decision seems to turn on the point that the phrase, "subject to the jurisdiction," refers only to the duty of obedience to the laws, not to political allegiance, the same ruling

should be made in case of children born in this country of aliens here temporarily only, for these owe a similar obedience to its laws, while here, as do their domiciled brethren. Prior to the Fourteenth Amendment it had been expressly so decided in New York, independently of any statute. *Lynch* v. *Clarke,* 1 Sandf. Ch. 583. See *United States* v. *Wong Kim Ark,* 169 U. S. 693, *affirming* 71 Fed. 382; *United States* v. *Look Tin Sing,* 21 Fed. 905.

As has been said, Congress in 1790 took the position and expressly enacted that foreign-born children of American parents were natural-born citizens. 1 *Stats. at L.* 104. But if our assumption be correct, that the function of this clause of the Fourteenth Amendment is to give a complete definition of citizenship, so that Congress has no power to extend its provisions, it would seem that such an enactment, if now on the statute books, would be beyond the powers of Congress. Indeed, Congress itself seems to have entertained doubts of the propriety of constituting such persons natural-born citizens, for within five years after its passage the language of the act was altered so that such persons were declared "citizens," but were no longer designated "natural-born citizens." But if not the latter, they must have been deemed naturalized citizens. *United States* v. *Wong Kim Ark,* 169 U. S. 687, 688, 702–703.

This brings us to consider the effect of the constitutional definition of citizenship upon the congressional power of naturalization.

The Fourteenth Amendment, so far as it refers to naturalized citizens, provides that "All persons * * * naturalized in the United States, and subject to the jurisdiction thereof, shall be citizens of the United States * * *" It is to be especially noted that the requirement that the person shall be "subject to the jurisdiction" applies equally to naturalized, and to natural-born, citizens.

What then becomes of the citizenship of the foreign-born child of American parents?

The present act of Congress dealing with this situation was passed in 1855, prior to the Fourteenth Amendment, and reads as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citi-

zens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." *U. S. Rev. Stats.*, § 1993, *U. S. Comp. Stats.*, p. 1268. And this is re-enforced by another act providing that "the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." *U. S. Rev. Stats.*, § 2172, *U. S. Comp. Stats.*, p. 1334.

If citizens at all these persons can not be natural-born, because not born in the United States, and must therefore be classed as naturalized citizens. But the constitutional definition of citizenship contained in the Fourteenth Amendment is just as stringent in demanding that naturalized, as that natural-born, citizens be "subject to the jurisdiction of the United States."

In respect of children born in this country of alien parents domiciled here, we have already seen that the phrase "subject to the jurisdiction" has been construed as referring to the obligation to obey our laws, and not to political allegiance. Are we now, with respect to these foreign-born children of Americans, to reverse our position and declare that the phrase refers to political allegiance, and not to subjection to local laws; and, if so, is it not begging the question to declare that such foreign-born children owe any allegiance to this country? That would be to reason in a circle, for that is the very question involved in the determination of their citizenship.

Upon the assumption that the Fourteenth Amendment does not merely confer citizenship upon a given class of persons, as seems to be maintained in *United States* v. *Wong Kim Ark*, 169 U. S. 687, 688, 702–703, but creates a clear, complete, and comprehensive definition of citizenship, as is declared in the *Slaughter-House Cases*, 16 Wall. 72–73, I submit, with diffidence, that Congress can not now by any form of act declare such children naturalized citizens unless, by presence in this country or otherwise, they have become subject to the jurisdiction of the United States.

Especially is it difficult to conceive how Congress can effect their naturalization by the particular acts above quoted, for in both acts it is expressly declared that the beneficiaries thereof are children

born *out of the jurisdiction* of the United States. We are then confronted with this dilemma: either the ordinary foreign-born child of American parentage, who has never returned to this country, is subject to the jurisdiction of the United States, in which case he is not "out of the jurisdiction," and hence the acts of Congress do not apply to him; or else, he is out of the jurisdiction, in which event, though he falls within the terms of those acts, the acts themselves would constitute an enlargement of the definition of citizenship, as announced in the Fourteenth Amendment, and would exceed the powers of Congress.

Another instance wherein Congress may have overstepped its powers in declaring persons to be citizens of the United States in the complete, constitutional sense, is to be found in the act of 1855, which, as it now appears, reads as follows: "Any woman who is now, or may hereafter be, married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." *U. S. Rev. Stats.*, § 1994, *U. S. Comp. Stats.*, p. 1268.

This mode of naturalization complies fully with the conditions of the Amendment, provided the lady be domiciled here, or perhaps even here temporarily, at the time of the marriage, for in such case she is subject to the jurisdiction of the United States in the sense that she is subject to its laws. *United States* v. *Wong Kim Ark*, 169 U. S. 693, *affirming* 71 Fed. 382; *United States* v. *Look Tin Sing*, 21 Fed. 905.

It has been decided that it is the status of marriage, not the act of marriage, that confers citizenship on the alien wife, so that, even though the husband also be an alien at the date of the marriage, his subsequent naturalization makes her a citizen too. *Kelly* v. *Owen*, 7 Wall. 496; *Kane* v. *McCarthy*, 63 N. C. 299, 304. Hence it may be asserted with some confidence that though the alien-wife may never have been in the United States at the time of the marriage, should she afterwards during the continuance of the marriage status come hither to reside, her citizenship would begin from the moment she thus becomes subject to the jurisdiction — and perhaps even though she come after her husband's death. *Headman* v. *Rose*, 63 Ga. 458.

But if we take the case of an alien woman, married abroad to an American citizen, and assume that she remain abroad continuously, it may well be doubted whether she can be regarded as subject to the jurisdiction of the United States in any sense. If not, she does not comply with the constitutional definition, and can not be a citizen, notwithstanding the act of Congress. At least, if she would make sure of American citizenship, it would be advisable that she sojourn in the United States for a time; or perhaps she might accomplish the same result by celebrating the nuptials in an American legation.

There are several decisions which appear at first glance to contravene these conclusions, but a closer inspection shows either that the case arose before the ratification of the Fourteenth Amendment or that the wife had at some time after the marriage come within the limits and jurisdiction of the United States. See *Kane* v. *McCarthy*, 63 N. C. 299; *Headman* v. *Rose*, 63 Ga. 458; *Ware* v. *Wisner*, 50 Fed. 310; 14 *Ops. Atty.-Gen.* 402.

On the other hand, our position upon this point has been sustained by no less an authority than Secretary Olney, who expressed the opinion that the naturalization of a Turkish subject did not operate to naturalize his wife who had never been in this country. *Sen. Doc. No. 83, 1st Session, 54th Congress.*

In the other cases of naturalization before mentioned, such as the case of infant children, dwelling here, born abroad of naturalized parents, or the collective naturalization of persons inhabiting territory ceded by treaty, or inhabiting a territory of the United States erected by Congress into a new state — in all of these cases the persons are already subject to the jurisdiction of the United States, and the questions above suggested do not present themselves.

Even in the cases where they do present themselves — the cases of foreign-born children of American parents and the alien wives of Americans married abroad — and assuming the soundness of our conclusion that Congress has no power to declare them complete citizens in all respects — it does not follow that they are to be deprived of the protection of our government. They may, and, in view of the acts of Congress before referred to, doubtless should, be regarded as belonging to the class of *quasi-citizens*, to which I shall now very briefly invite your attention.

II. *Quasi-Citizenship of the United States.*

For the sake of convenience I have selected the term *quasi-citizen* as appropriate to designate those persons who, while not enjoying the franchise of citizenship in its full constitutional sense, yet may be the objects of the country's solicitude and protection when their personal or property rights are menaced by alien governments.

To this class, if conclusions before reached are sound, belongs the foreign-born child of American parents who has never become subject to the jurisdiction of the United States, or in like case the alien woman who has married an American.

Another example of this class is a partnership whose interests are imperiled by foreign aggression.

If all the partners are citizens of the United States, their status attaches to the partnership itself, at least to the extent of constituting it a quasi-citizen, whose rights will be protected by the government. The records of international claims commissions to which our government has been a party, as well as the records of the State Department, contain many cases wherein the claims of American firms have been settled on the basis of such connections with the United States.

But if some of the partners are citizens of other countries, the interests of the partners are regarded as separable, whether the partnership itself have its chief place of business in this country or elsewhere, and the rights of our citizens alone will be protected by the government, the alien partners being left to shift for themselves or to demand the intervention of their own governments.

As was said by the international claims commission in passing upon the case of Thomas Morrison, Surviving Partner of Plumer & Morrison, 3 Moore, Int. Arb., p. 2325:

> The right of the citizen to claim the protection of his own government against the wrongful acts of a foreign government is a personal right, confined to the citizen injured, and can not be by him extended or transferred. He can not, by connecting himself with the citizens of another country in his business relations, throw over them the mantle of his own government or enable them to invoke its protection. If the government of a country in which a citizen of the

United States is temporarily domiciled destroys property owned jointly by such citizens and by foreigners, the United States, by the law of nations, can demand indemnity only for the injury to its own citizens, and the measure of the indemnity would be the extent of the interest of such citizen in the property destroyed.

See also the case of *Hargous & Voss,* 3 Moore, Int. Arb., p. 2327, 6 Moore, Dig. Int. Law, 641.

The last instance of quasi-citizenship is that of American corporations engaged in foreign trade or business. These, whether incorporated by the United States or by one of the States of the Union, are uniformly regarded as entitled to the government's protection. Indeed it is now customary to include in all claims conventions the provision that the submission or settlement shall embrace " all claims on the part of corporations, companies or private individuals, citizens of" . . . the particular country. 6 Moore, Int. Law Dig. 641–643; 3 *Id.* 800 *et seq.*

In these cases it is established that the citizenship of the stockholders is immaterial. They may even all be aliens, but if the company be incorporated in the United States, it is a quasi-citizen, and entitled to our government's protection. The stock to-day owned by aliens may to-morrow be in the hands of citizens, or *vice versa,* and to hold the citizenship of the corporation to depend upon that of the stockholders, or a majority of them, would be to shift the corporation's citizenship from day to day, and to create inextricable confusion. 3 Moore, Int. Law Dig. 800 *et seq.;* 6 *Id.* 644 *et seq.*

E converso, the fact that American citizens or corporations hold some, or even the whole, of the stock of a company incorporated abroad does not entitle them to demand the intervention of the United States to protect the corporation itself against oppressive acts of foreign governments, for as shareholders they have no individual property in the chattels or credits of the corporation. 3 Moore, Int. Law Dig. 803; 6 *Id.* 644 *et seq.*

It is otherwise, however, if the acts of the foreign government are directed, not against the property of the corporation, but against the stock itself held by American stockholders, as, for example, governmental acts whereby such stock is unjustifiably confiscated.

Americans shall not then invoke the aid of their government in vain. 6 Moore, Int. Law Dig. 644 *et seq.*

[At this point Hon. John W. Foster, one of the vice-presidents of the Society, took the chair.]

The CHAIRMAN. We have just listened to two very interesting papers, one by Professor Scott and the other by Mr. Borchardt, on the question of the limitation of protection by contract between the citizen and a foreign government, or by municipal legislation, and also to the paper just read by Professor Minor on citizenship in the United States. These subjects are now open for general discussion and comment on the papers read and on the general subject. I hope there will be no hesitation on the part of the members of the Society in taking part in this discussion.

As there seems to be a reluctance to begin the discussion, I will try to reach some of the modest men by personal appeal. We are honored by the presence among us of a number of the distinguished educators of the country, among whom none is more distinguished than the president of the University of Chicago, Professor Judson, and if he can not discuss this question, I know he can tell us something that will be of interest to us. We will be glad to hear from Professor Judson, and we will then expect some of the rest of you to take up this subject for discussion.

Professor JUDSON. Mr. President and Gentlemen: I had not the slightest idea of discussing this very interesting subject which has been so ably dealt with in the papers you have listened to. I heartily indorse what the President has said to you, and I am glad the Society has been organized. I am glad to do my part in making it as successful as it should be.

The papers which have been presented yesterday and to-day could not adequately be discussed off-hand by any man; but two or three points occur to me in connection with the general subject.

The title so happily selected by one of the speakers, "Quasi-Citizens," and its application to corporations, is an interesting one.

Corporations are, of course, artificial persons, created by and subject to the law. Being subject to the law, they are also entitled to protection. Does not essentially the same condition apply to the Indian tribal relations? They are subject to the laws of the United

States and entitled to the protection of them. The citizens of Porto Rico and the inhabitants of the Philippine Islands owe allegiance to the United States and obedience to its laws. They are subject to its jurisdiction and entitled to its protection; and yet none of them are citizens, in the full sense of the word.

So that our law now knows these different classes which might be known as, first, those who are citizens, and secondly, those who owe allegiance to and are entitled to the protection to which citizens are entitled.

So far as the Fourteenth Amendment to the Constitution is concerned, in the absence of a final, conclusive, and adequate definition by the Supreme Court of the United States, it seems to me that the Amendment does not exhaust the powers of Congress on that subject and is not a comprehensive definition. It does enumerate certain classes of persons who are citizens; but not all those persons. There are other matters of the same kind which seem to me to bear on this question; but I do not wish to take up the time of the Society in discussing them.

I now wish to express to you the great interest I have had in listening to these papers, and to congratulate the Society upon the fact that there is growing up among us to-day a body of young men who are interested in this subject. I apply that term to the speakers who have preceded me, because when I was a lad in college the gentlemen who were interested in international law were uniformly gentlemen who were ripe in years with gray hair, and not much of it.

The CHAIRMAN. The report of the Committee on Nominations will now be in order.

REPORT OF THE COMMITTEE ON NOMINATIONS

Mr. BUTLER. Mr. Chairman: On behalf of the Committee on Nominations appointed by the Executive Council, I make the following report:

WASHINGTON, D. C., *April 29, 1910.*

To the

AMERICAN SOCIETY OF INTERNATIONAL LAW:

Your Committee on Nominations has the honor to report the following nominations:

For Honorary President

Hon. William H. Taft

For President

Hon. Elihu Root

For Vice-Presidents

Chief Justice Fuller	Hon. John W. Griggs
Justice William R. Day	Hon. William W. Morrow
Hon. P. C. Knox	Hon. Richard Olney
Hon. Andrew Carnegie	Hon. Horace Porter
Hon. Joseph H. Choate	Hon. Oscar S. Straus
Hon. John W. Foster	Hon. Shelby M. Cullom
Hon. George Gray	Hon. Jacob M. Dickinson

For the Executive Council to serve until 1913:

Hon. James B. Angell, Michigan
Hon. Augustus O. Bacon, Georgia
Hon. Frank C. Partridge, Vermont
Prof. Leo S. Rowe, Pennsylvania
F. R. Coudert, Esq., New York
Everett P. Wheeler, Esq., New York
Hon. Edwin Denby, Michigan
Alpheus H. Snow, Esq., District of Columbia

To fill the vacancy in the Executive Council to serve until 1912, to succeed Hon. Jacob M. Dickinson:

Mr. Jackson H. Ralston of the District of Columbia.

Respectfully submitted,

C. H. Butler, *Chairman,*
Geo. B. Davis
(Signed) J. F. Colby
Chas. C. Hyde
Walter S. Penfield

The Chairman. You have heard the report of the Committee, and in the absence of objection it will be accepted. The election will take place at the meeting of the Society to-morrow.

We have with us Mr. Marburg, of Baltimore, and I am sure all of those present will be very glad to hear from him.

Mr. BUTLER. May I, before the proceedings continue, call attention to the fact that the memorial services of the Supreme Court in memory of our late vice-president, Mr. Justice Brewer, whose death we so much deplore, will take place to-morrow in the Supreme Court, at 12 o'clock.

The CHAIRMAN. You have heard the announcement. As adequate accommodations as possible will be afforded at the Clerk's office of the Supreme Court to-morrow for the purpose of enabling you to attend those services.

Mr. MARBURG. Mr. Chairman, I feel very much complimented at being called upon to address the Society; but I have given so little thought to this special topic that I feel I can not contribute anything of value, and I ask to be excused.

The CHAIRMAN. Mr. William C. Dennis, of the State Department, is here and we would like to hear a word from him on the subject under discussion this evening.

Mr. DENNIS. I have been very glad indeed to be here this afternoon; but inasmuch as some of the questions which are being discussed are matters which I will have to work with officially, I think it is better for me to come and listen and learn, rather than to attempt to say anything. It has been a very great pleasure for me to be here and listen to these discussions.

The CHAIRMAN. As there is no further discussion, and the hour of adjournment has arrived, I announce that the next meeting of the Society will be called at 8 o'clock this evening.

The Society thereupon adjourned until 8 o'clock p. m., April 29, 1910.

EVENING SESSION

(Friday, April 29, 1910)

The Society was called to order at 8 o'clock p. m. In the absence of the president, Hon. George Gray, one of the vice-presidents, presided.

The CHAIRMAN. Ladies and gentlemen, I have had the honor conferred upon me of an invitation to preside at the evening session of the Society, and I want to express to my brother members and those who are present my disappointment at not being able to be here yesterday and last evening, when I understand there was a large attendance and a very interesting program.

I congratulate you, ladies and gentlemen, upon the progress that has been made, under the auspices of this Society, in bringing about a nearer approach of the peoples of the world to each other. It would seem as if the fullness of time, which was so necessary to that great Evangel, had come again for this new Evangel, of "peace on earth and good will to men."

The program this evening, as you are aware, concerns the very interesting question of *The Question of Domicile in Its Relation to Protection.* I have the pleasure to announce that the paper by Professor Macvane will be read by Professor Scott.

Mr. SCOTT. Mr. Chairman, ladies, and gentlemen: Professor Macvane, of Harvard University, had hoped to be present this evening, but was detained. He has sent a short note, in the form of a letter, as an evidence of his good will and interest in the proceedings of the Society. The paper deals with a restricted phase of the subject under consideration; but the conclusion touches very directly upon the broad question of domicile.

I shall read his entire letter.

LETTER OF PROF. S. M. MACVANE, OF HARVARD UNIVERSITY, TO DR. J. B. SCOTT, RECORDING SECRETARY OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, DATED APRIL 27, 1910.

The shortness of your notice makes it impossible for me to write a formal paper. I will therefore confine myself to the form of a letter giving in brief my view of the need of change in our law of naturalization.

I think, in the first place, that our requirement of five years' residence is excessive. We are alone among great countries in de-

manding so long a period. It seems to me highly undesirable to have a large body of domiciled aliens among us. They are a source of danger to the friendly relations between states. While having their hearth and home under our government they are entitled to the protection of another government. It is at best an awkward situation, and it would be good policy to keep down, as far as possible, the number of persons occupying it. In considering the matter, it is important to keep in mind the fact that these persons are living with us, and are going to live with us, in any case. Even if we got into war with the country of their birth, we should not expel them. The gift of citizenship would not make them more dangerous, if danger be thought of in their case. I think it would make them more certainly useful to us, for we should have full right to control their action and their services.

It is worth while to recall how the progress of the world has narrowed the distinction between resident aliens and citizens. The alien has now practically complete civil rights. The bearing of this fact on our present question is that the alien is not now under any serious pressure tending to make him eager for citizenship. If we make the process of naturalization long or difficult in other ways, he easily learns that he gets on very well without it. The result is to keep the class of domiciled aliens unduly large. In my opinion, if a fixed period of residence be required, two years would be a much better rule than five. Our circumstances have changed radically since 1802 when the present rule was adopted. We have learned the value of immigration. With our present enormous body of citizens, safeguards that may have been needful in 1802 are no longer needful. We need have no fears of ill effects from too early admission of newcomers to the register of voters. This is sufficiently attested by the experience of those states that have long given the voting right to newcomers who declare their intention of becoming citizens. That declaration, be it remembered, may be made the day the immigrant arrives. I have seen no suggestion that the states in question have suffered in any way, or have failed in patriotic spirit, by reason of their liberality towards their domiciled aliens.

In the second place, the requirement of a preliminary declaration of intention, two years before admission to citizenship, is a needless complication. If the object be to give opportunity for investigation, the requirement has been futile; it has not worked so. For investigation purposes three months would be ample. When a man has come to us by his own free choice, and wishes to become a citizen, what rational object is there in putting off the event? If his mind is made up, and we find him in other ways worthy, why not admit him at once? We proclaim that he has the right of expatriation, but compel him to remain a citizen of his native country years after he has made up his mind to exercise the right.

We further complicate the case by requiring of the candidate, both in the preliminary declaration and at final admission, a formal and resounding renunciation of his allegiance to his native country. I doubt if native-born citizens quite appreciate the effect of this requirement. Perhaps I may be pardoned if I use my own case to illustrate. From the beginning of my residence in this country I intended to make it my permanent home, and to assume all the responsibilities of a citizen. But this requirement jarred on my feelings. I had deliberately abandoned my old allegiance; I was ready to swear allegiance to the United States and to live up to it. But to renounce, in those terms, and in that hard-hearted fashion, the land of my birth, seemed a sort of profanation, almost as if I were asked to renounce my mother. The requirement delayed my naturalization by at least ten years, and I have heard of other cases in which the effect was the same. Probably in most cases the renunciation is made without difficulty. Whether those who go through it lightly are the most desirable citizens may be a matter of opinion. My point is that it tends to keep serious-minded persons in the class of domiciled aliens longer than is desirable. We are practically alone in exacting it. Other countries rely on the oath of allegiance.

There is another and more fundamental objection to the requirement of renunciation. It assumes that the individual may at will renounce his allegiance by birth. That assumption can not be sus-

tained, nor have we any interest in maintaining it. The only principle we are interested in defending is that the acceptance of a new citizenship by naturalization has the effect of superseding the citizenship by birth. To that doctrine the world has practically come, under our leadership, and with that result we ought to be satisfied. Now that we are taking a place among the world-powers, we can not afford to fly in the face of the general consensus of other nations at any important point.

Probably no President of the United States will ever again maintain that an alien who has made the declaration is "clothed with the nationality of the United States." Between alien and citizen there is no intermediate class clothed, even in part, with our nationality. A domiciled alien is still an alien. In our own country we can regard him as we please; but outside our jurisdiction he is still clothed with his original nationality or with none. In a majority of our treaties regarding naturalization we have been led to admit that the declaration has no effect on citizenship.

There are so many dangers of friction between countries in connection with citizenship and naturalization, it is a pity and a grave mistake to add needless complications. Our acts of Congress relating to these subjects need radical revision. It would be impossible to conduct our foreign relations in accordance with those acts. The time has come to agitate for greater simplicity and more conformity to the usages of other free countries. My present object is to suggest, for naturalization, two years of residence, a short notice of intention, evidence of good character, and (instead of all the present oaths and declarations) the simple oath of allegiance. The great object to be aimed at is to make as nearly universal as we can the principle that the government under which a man lives shall be the only one entitled to claim his allegiance, and also the only one on which he is entitled to call for protection when out of its jurisdiction.

The CHAIRMAN. We will now hear from Professor Latané, on the same theme.

ADDRESS OF PROF. JOHN H. LATANÉ, OF WASHINGTON AND LEE UNIVERSITY,

ON

The Question of Domicile in Its Relation to Protection.

A state has the undoubted right to extend protection to its citizens abroad when justice has been denied them or palpable injustice done them. Citizenship, however, is determined by municipal and not by international law, and since the laws of different countries are often in direct conflict, the citizenship of a given person may be a matter of dispute. Such cases usually arise out of a change of domicile. Domicile is defined by Story as the place where a person has "his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning." Thus a person may be a citizen of one country, have his domicile in another, and temporarily reside in a third.

Under what circumstances does a person lose his nationality of birth, or forfeit his right to the protection of his native state? A change of domicile does not of itself effect a change of nationality. In rendering a decision for the Mexican Claims Commission of 1868 Dr. Lieber said:

> Domicile in a foreign country does not denationalize, unless there be a distinct law to that effect in the native or adopted country of the respective person.[1]

Some states provide by statute that subjects who emigrate to foreign countries shall forfeit their citizenship after the lapse of a given number of years. For instance, a German subject who has lived abroad for ten years without taking any steps to retain his citizenship forfeits it and with it all right to national protection. Similar provisions occur in the laws of most European countries, but not in the laws of England or the United States.

Although Congress asserted in 1868 the abstract right of expatriation as a fundamental principle of this government, it did not then, nor indeed until the act of 1907, determine when or under what circumstances a native born citizen of the United States shall

[1] Moore, International Arbitrations, III, 2706.

be deemed to have lost his citizenship. In the absence of a statutory definition of the modes of expatriation the State Department has had to decide individual cases as they have arisen on their merits, and the opinions of the different secretaries have not always been consistent. It has frequently been held that long continued residence abroad creates a presumption that citizenship has been abandoned and that evidence must be adduced to the contrary before protection will be extended. A few quotations from the instructions of the Department will suffice for purposes of illustration:

Mr. Webster said in 1851:

You inform us that many American citizens have gone to settle in the Sandwich Islands; if so they have ceased to be American citizens. The Government of the United States must, of course, feel an interest in them not extended to foreigners, but by the law of nations they have no right further to demand the protection of this government.[2]

Mr. Everett held in 1853 that

the presumption of abandonment of nationality by long residence abroad is rebutted by proof that such residence was that of a missionary who neither intended to relinquish his nationality nor abandon the intention of coming home.[3]

Mr. Marcy held in 1855 that

Persons voluntarily emigrating from the United States to take up a permanent abode in a foreign land cease to be citizens of the United States, and can have, after such a change of allegiance, no claim to protection as such citizens from this government.[4]

Mr. Seward declared in 1862:

The citizen of the United States who becomes domiciliated in another country, contributing his labor, talents, or wealth, to the support of society there, becomes practically a member of the political state existing there, and for the time withdraws himself from the duties of citizenship here, and consents to waive the reciprocal right of protection from his own government.[5]

[2] Moore, Dig. Int. Law, III, 758.
[3] *Ibid*, 759.
[4] *Ibid*.
[5] *Ibid*, 760.

Mr. Fish wrote in 1870:

Although it may be that you have not by any formal act of naturalization renounced your allegiance to the United States, a residence of so long continuance in Hayti raises a strong presumption that you have incorporated yourself into the permanent population of the island and ceased to regard yourself as subject to the duties of a citizen. It will be regarded as quite material in respect to your national character to know whether you have complied with the provisions of the acts of Congress passed in 1862 and subsequent years imposing an income tax upon citizens residing abroad.[6]

Mr. Fish stated the same principle still more clearly in 1871:

Citizenship involves duties and obligations, as well as rights. The correlative right of protection by the government may be waived or lost by long continued avoidance and silent withdrawal from the performance of the duties of citizenship as well as by open renunciation.[7]

Mr. Evarts held in 1879:

While expatriation may be, and sometimes is presumed from that circumstance (continued residence in another country), it is by no means conclusive of the fact. A citizen of the United States may be absent from his country for an indefinite period for purposes of education, of business, or of pleasure, and so long as he does no act or assumes no obligations inconsistent with his native or acquired citizenship in this country, he is not held under our laws to have forfeited any of his rights as a citizen of the United States.[8]

The doctrine enunciated in the latter part of this statement is still more clearly expressed by Mr. Bayard in 1887:

This government, maintaining the doctrine of voluntary expatriation, has always held that its citizens are free to divest themselves of their allegiance by emigration and other acts manifesting an intention to do so. Mere residence abroad is not, however, construed as an abandonment of allegiance. It is only when such residence is accompanied by acts inconsistent with allegiance to the United States or indicative of an intention to abandon it, that this government holds it to have been renounced.[9]

[6] *Ibid*, 762.
[7] *Ibid.*
[8] *Ibid*, 717.
[9] *Ibid*, 584.

In some of the above utterances there appears to be a tendency to generalize on a single case and a failure to distinguish between loss of nationality and loss of right to national protection. As long as a person retains a given nationality he has the right to appeal to his government for protection, but that government must decide for itself whether it is right or expedient to interfere in his behalf. Protection may be extended to an individual under one set of circumstances and denied to the same individual under another set of circumstances. The forfeiture of the right to protection in a given case does not imply a general loss of the right to protection on the part of the individual concerned, for nationality and protection are coincident.

The act of 1907 has relieved the State Department of some of its difficulties by providing

That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

It would appear that under this act the citizenship of native born Americans can not be abandoned except by a positive act of allegiance to some other power. Long continued residence abroad unaccompanied by such an act can not now as formerly create a presumption that citizenship has been abandoned.

Under the act of February 10, 1855, children born to citizens domiciled abroad are citizens of the United States, "but the rights of citizenship shall not descend to children whose fathers never resided in the United States." In order to retain their American citizenship, children born abroad of American parents are required by the act of 1907 upon reaching the age of eighteen years to record at an American consulate their intention to become residents of the United States, and they are further required upon attaining their majority to take the oath of allegiance to the United States. This requirement is in reality a special form of naturalization provided for children born abroad of American parentage.

Acquired nationality is, as a general rule, more easily lost than nationality of birth. The act of 1907 provides that

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen,

but this presumption may be overcome by the presentation of satisfactory evidence to a diplomatic or consular officer of the United States. With this exception, there has never been any distinction in our laws, so far as their status abroad is concerned, between native born and naturalized citizens, and the latter have been entitled in legal theory to just as full protection abroad as the former, even in the country of their origin, but practically certain difficulties have arisen, particularly in connection with those countries which require military service of all citizens, which have made it impossible to live up to the theory. In the case of young men who have come to this country and taken out naturalization papers before performing military service and then returned to their native land, we have found it impossible successfully to assert our doctrine of expatriation. The American doctrine as embodied in the act of 1868 is that naturalization effects a complete change of allegiance and absolves the individual from all obligations to the country of his birth. The opposing doctrine is that naturalization merely adds a new allegiance to the old and does not absolve the individual from obligations to his former sovereign; that he becomes subject to a dual allegiance; and that when he comes within the jurisdiction of his native government he may be required to fulfil duties which he would have been held to had he resided there continuously. Since 1872 we have practically, though not theoretically, acquiesced in this view. We have not been willing, however, to embody it in treaties, and that accounts for the fact that the negotiation of naturalization conventions so auspiciously begun in 1868 came to a sudden end. No naturalization treaties have been negotiated since 1872 except the one with Hayti and the recent treaties with Portugal, Uruguay, Salvador, and Peru.

The rule as to the loss of acquired citizenship and the right to protection does not apply to naturalized citizens who reside abroad as agents of American business houses. It is a common practice of

commercial houses to send abroad natives of the countries with which they have trade relations. With reference to the issuance of passports to naturalized citizens Secretary Olney said in 1896:

> In cases of representative business agencies abroad, the Department does not exact a declaration to return at a fixed time, but it does require a declaration of a fixed intent to return some time, which intent shall not be negatived by the obvious circumstances of the applicant's domicile abroad.[10]

The only clear case in which domicile is a test of national character is that of citizens of neutral countries carrying on business in belligerent communities. Domicile in a belligerent country imparts to the citizen or subject of a neutral state the character of an enemy, and renders his property subject to condemnation under the usual rules of war.

Where an individual possesses no nationality under municipal law, domicile may under international law invest him with a nationality. This doctrine was advanced by Mr. Marcy in the celebrated case of Martin Koszta. Koszta was an Austrian subject who took part in the Hungarian revolution of 1848–49, and at its close took refuge in Turkish territory. Austria demanded his extradition, but Turkey refused to surrender him. The Austrian Government then issued a formal decree of banishment against him. From Turkey he came to the United States and made a declaration of intention to become an American citizen. Nearly two years later he returned to Turkey on private business and placed himself under the protection of the American consul in accordance with the local custom which permitted Franks or sojourners to place themselves under the protection of the representative of any of the Western or Christian Powers. When on the point of returning to the United States he was seized at Smyrna by a band of ruffians, who, it appeared later, were instigated by the Austrian consul, and thrown into the sea. He was picked up and taken abroad the Austrian warship Huszar and confined in irons, the intention being to take him to Austria. The American chargé at Constantinople and the

[10] Moore, Dig. Int. Law, III, 773.

American consul at Smyrna both demanded his release, but without success. Just at this juncture the American war vessel *St. Louis* arrived on the scene and Captain Ingraham demanded Koszta's release under threat of resorting to force. In order to avoid a conflict in the harbor at Smyrna, Koszta was by mutual consent placed in the custody of the French consul-general pending the conclusion of an agreement between the United States and Austria. Mr. Marcy justified Captain Ingraham's conduct and demanded that Koszta be handed over to the United States. He held that Austria had no right to complain of a violation of Turkish territory; that the United States stood ready to make all necessary explanations to Turkey, but that no explanations had been so far demanded; that as the case arose in the territory of a third Power it could not be settled either by Austrian or American law, but only by international law; that Koszta's connection with Austria had ceased by virtue of his emigration and banishment; that though not a citizen of the United States under its municipal law, he might under international law acquire national character from domicile; and that even if this were not the case, he was clothed with American nationality as soon as he placed himself under the protection of the American consul. After a lengthy correspondence between the two governments, Koszta was finally delivered into the custody of the United States and brought to America.

That the acquirement of a domicile in the United States coupled with the declaration of intention to become a citizen may confer on an individual national character before the completion of the process of naturalization is clearly recognized by the provisions of the act of 1907 in regard to passports:

> Where any person has made a declaration of intention to become (a citizen of the United States) as provided by law and has resided in the United States for three years, a passport may be issued to him entitling him to the protection of the government in any foreign country: *Provided,* That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this government in the country of which he was a citizen prior to making such declaration of intention.

With the free movement of population from one country to another to meet the demands of the modern conditions of life, it becomes increasingly necessary that questions arising out of a change of domicile should be settled on a permanent basis. International law can not undertake to decide the citizenship of individuals. It can not make or unmake citizens. Citizenship is a question of municipal law. States can, however, by treaty, agree to adopt the same rules in regard to change of allegiance and thus avoid the conflicts that now arise. The main obstacle appears to be the claim of the Continental Powers to demand military service of all young men on arriving at a certain age. We have been forced as a matter of practice to concede this point, and there would appear to be no serious objection to embodying it in treaties.

The CHAIRMAN. I understand the rule, in our proceedings here, to be that after the reading of papers is concluded a discussion of the theme that has been developed in those papers is open to the members on the floor, in speeches not exceeding ten minutes.

I would like to ask Professor Latané, for my own information, in regard to the act of 1907 to which he alluded, as fixing the evidence that shall determine the status of an American citizen who intends to expatriate himself, and whether anything except naturalization in a foreign country is evidence of that fact.

Professor LATANÉ. The statute provides for his being naturalized and taking the oath of allegiance. Sometimes a persons accepts office under a foreign government and simply takes the oath of allegiance without becoming naturalized. Those are the only two provisions mentioned in the statute, and I would infer that there could not be any presumption of abandonment of citizenship, except for those two acts.

Mr. FOSTER. Mr. President and Mr. Chairman: There seems to be a disposition among the members not to talk about this subject. I thought men educated in this profession were generally inclined to talk.

It occurred to me, during the reading of the letter, the author of which was born in a foreign country, there was manifested an un-

necessary sensitiveness about his renunciation of his allegiance to the government to which he first owed his obligation of citizenship. I do not recall the language of the oath which is taken; but my recollection is that it simply renounces any allegiance to any foreign prince, potentate, or power.

Can there be anything like a double allegiance? Can a German who comes to this country and becomes an American citizen have any allegiance to the Emperor of Germany?

I speak rather freely on this subject because I am the son of a foreign-born citizen. My father was born in England. It is true that he came to this country when he was quite young and he became a naturalized citizen of this country, and I am quite sure he gave up all allegiance to the mother country when he became a citizen of America. I never knew a man who was more patriotic as an American citizen than he was, and that ought to be the spirit of every man who comes to this country and voluntarily assumes our citizenship.

I simply want to remark that I would have liked to ask the author of the letter his view of that subject, if he were present. As he is not present, I thought I would make the point. I think he is manifesting undue sensitiveness on the subject.

Mr. W. H. Dennis. Mr. Chairman: I might say, as an humble contribution to the facts which have been brought out this evening, that we have encountered in the District of Columbia a curious phase of the question with which Professor Latané dealt. The question arose in regard to admission to the bar. We have a great number of applicants who come here from widely different regions, and some of them are in a somewhat embryotic condition of citizenship. They have declared their intention of becoming citizens, but are unable to go further on account of the requirements of a certain lapse of time of residence in this country. We have had to argue that question before the court for its information, as to whether they could be admitted to the bar under those circumstances.

By analogy to the Koszta case and analogy to the statute in regard to holding real estate in the District of Columbia, which provides

that those who have declared their intention of becoming citizens shall have the same right to hold real estate as citizens, the court here was led to admit men who are in that ambiguous position. It struck me, when the letter was read by Professor Scott, that these men were in such a difficulty as he indicated, and that they were neither one thing nor the other, neither fish, flesh, nor fowl. It appeared to me that the remedy he suggested would be very applicable to that difficulty.

I merely suggest this as one phase of the general question of naturalization and partial naturalization.

Dr. MERRILL E. GATES (ex-President of Amherst College). Mr. Chairman: While the question of embryonic citizenship is before us, I would like to call attention for a moment to a body of residents in this country, numbering from two hundred and fifty thousand to three hundred thousand, whose history presents anomalous phases of gradual progress towards citizenship. In questions of allegiance, sovereignty, and citizenship, their history is an interesting study. I refer, of course, to the native American Indians.

Some of the older members who are present may recall the fact that Daniel Webster attempted in vain to define the position of the Indian with reference to citizenship. After Webster had exhausted his skill in the vain attempt, he fell back upon an old legal phrase and denominated the Indians, "perpetual inhabitants with diminutive rights." General Caleb Cushing styled the Indians "domestic subjects." The Indian was not a citizen. He had not the right to vote, and he could not in any way acquire that right. "Indians not taxed" were expressly excluded from the number of those who were accounted citizens and might be electors. Yet the Indian was not a foreigner. He was not an alien; and he could not by naturalization become a citizen of the United States. He did not owe, and he had never owed, allegiance to any foreign sovereign power. He was a native-born American, as were his parents; but he was not a natural-born citizen. Yet he was not born under any other government than our own; and while in our early history we made treaties with Indian tribes, the Indian tribe has never been recog-

nized as a "state" in the proper sense of the term, with which treaties can be rightly made. Until 1887, we had said to hundreds of well-educated men of Indian blood, "You are native-born Americans; yet no matter how worthy of citizenship you prove yourselves, you can not by any possibility become citizens of the United States. The negroes, who are your emancipated freed-men, are citizens, and the door of naturalization is open to any foreigner who will live among us six years, it matters little how vicious or ignorant he may be; but that door is shut and barred against you."

Captain Pratt, the head of the Carlisle Indian School, used to take, in imagination, a boat load of his educated young Indians out into the harbor of New York, as a big steamer was coming in with hundreds of immigrants on its decks. "Any one of those ignorant foreigners, from all parts of Europe," he would say to these Indians, "may become an American citizen; but you, the only original Americans, can not in any way become American citizens."

Not only were the Indians shut out from the privileges of citizenship, but there was no way provided for them to secure those rights in our courts which are uniformly conceded to aliens resident among us. An Indian could not appear in court; nor could an attorney appear for him unless especially ordered so to do by the Secretary of the Interior through the Indian Bureau.

In 1869 the United States Board of Indian Commissioners (of which I have been a member for the last twenty-six years) made the first draft of a bill to allot land in severalty to Indians. It required nearly twenty years of steady agitation before the public opinion of the country was sufficiently educated to force the passage of the Severalty Act. In March, 1887, the General Severalty Act for Indians was passed. It had been perfected in form by Senator Henry L. Dawes, of Massachusetts, the weight of whose character and the strength of whose influence rendered possible the passage of the act at that time. By this act a homestead of land was given as an individual allotment to each Indian of a tribe which had been declared fit for allotment, and every man, woman, and child who received an allotment of land under the Dawes Act thereby immediately became a citizen. The government, upon allotment, gave to

each Indian a "protected title" which rendered his land inalienable and nontaxable for a period of twenty-five years; but from the date when he received the allotment, the Indian became a citizen with the right to vote. About one hundred thousand Indians have been made citizens under that law.

In 1872 (to refer for a moment to the question of "Treaties with Indian Tribes," alluded to by Professor Minor in his paper yesterday) Congress declared that no more treaties should be made with Indian tribes, as such; and that these tribes should not be even inferentially regarded, hereafter, as "states" or nations with whom treaties could be made. The attempt to regard an Indian tribe as a "foreign state" existing upon United States territory, yet having an *imperium in imperio* of its own, had led to so many patent absurdities, that Congress did away with the last vestiges of that attempt in 1872. But the Five Civilized Tribes of Indian Territory and Oklahoma were left outside the Severalty Act; and, protected by well-drawn treaties, were still to be reckoned with before they could become citizens of the United States.

What is known as the Curtis Act, carrying the name of one of the two distinguished Senators of the United States (Senator Curtis and Senator Owen) who are Indians by birth and by tribal rights, conferred citizenship upon about one hundred thousand more of our three hundred thousand Indians, namely, upon those Indians who were members of the Five Civilized Tribes and were residents of Oklahoma and the Indian Territory, and are now citizens of the State of Oklahoma and of the United States. There remained about one-third of our Indian population still to be dealt with.

In May, 1906, the provisions of the General Severalty Act were superseded by what is known as "The Burke Law." Under the operation of that law an allotment of land made to an Indian does not carry with it citizenship for the Indian, as it did under the Dawes General Severalty Act. The United States under the Burke law gives to the allotted Indian a protected title, which makes his land inalienable and nontaxable for twenty-five years, unless, before that time shall have expired, the allotted Indian shall apply for citizenship and the Secretary of the Interior shall be of the opinion

that said Indian is competent to become a citizen, and shall thereupon give him a patent in fee simple to his allotted land, thereby making him a citizen. Under the operation of the Burke law the remaining one hundred thousand Indians who are not yet citizens are very slowly coming into citizenship.

These facts illustrate the successive stages along the line of gradual approach to citizenship for the three hundred thousand native-born American Indians who are not only the original, but the *aboriginal* Americans, yet who are to be the very last class of residents upon our territory fully admitted to the rights and privileges of citizenship.

Mr. MARBURG. I want to make one point in regard to Mr. Macvane's paper with reference to a shorter period in order to entitle a foreigner to citizenship. I simply want to call attention to the fact that nowhere in Europe is there such a tide of immigation to any one country as there is to the United States, and on that account precedents ought not to have so much weight with us. Here we have certain problems to deal with which they do not face.

There is a distinct growth of socialism in this country, in the last few years. For example, since the retirement of Mr. John Mitchell from the presidency of the Miners' Association that body has pronounced itself as in favor of socialism, and they are very strong about it. That is only a straw to show which way the wind blows. There is a distinct growth in other directions. We see that Milwaukee has been captured by the socialists.

In the city of Paris, which has been partially governed by a municipal council which has been socialistic for some years, that council is subject to the Prefect of the Seine, appointed by the central government, which is a protection, in a big city like Paris, against carrying out socialistic ideas. We have no such protection here.

We hear a great cry for local self-government in the cities, a cry which, I think, is not well founded because of that very danger. On that account we ought to move very cautiously in granting citizenship to a foreigner who comes here without a knowledge of the spirit

of our institutions, with reference to the time for him to acquire that knowledge.

Mr. RALSTON. Mr. Chairman: I just want to say one word on the general branch of the subject which is under discussion, and which, perhaps, is not entirely met in the very interesting paper by Professor Latané.

The paper has discussed the question of protection, and the ideas of the various Secretaries of State as to persons to whom protection should be granted. That same question has repeatedly come before arbitral tribunals.

Before the Mexican and American Claims Commission, of 1868, the question was raised repeatedly as to whether a person who had merely made a declaration of intention to become a citizen of the United States was entitled to be heard as a claimant. The same question has arisen before other tribunals.

As to that particular point, I think there has been a unanimity of decision that those who had merely declared intention to become citizens should not be recognized as proper claimants before an institution of that character. But there have been very interesting qualifications of that rule, at least as declared by commissions and umpires. The particular titles of the cases do not occur to me at this moment; but persons who are fully entitled to the protection of the United States and occupy a status less than that of citizenship have been heard and have recovered. For instance, probably fifty or sixty years ago a negro who was, under the circumstances, not recognized as a citizen of the United States but was fully entitled to the protection of the United States, succeeded in recovering an arbitral award.

So, in another case, a sailor upon an American vessel was recognized as being under the protection of the American flag and an injury done to him or to his ship at that time, resulting in damage to him, was regarded as something which was entitled to be properly compensated for, in a tribunal of that character.

Of course much may depend, in the particular instance, upon the nature of the protocol creating the commission; but it is, I think, somewhat interesting to note the attitude that arbitral tribunals have found it necessary to take upon a branch of that particular question.

Professor LATANÉ. With reference to the Mexican Claims Commission of 1868, there was rather a curious distinction drawn. They held that where a man had made a declaration of citizenship and of his intention to become a citizen, but had not carried it out, he was not entitled to recover; but that where he had made the declaration and subsequently to the time when the claim arose he had perfected his citizenship he was entitled to recover.

Mr. RALSTON. Just a word on that point. One or two of the earlier decisions of the Mexican Commission did recognize the right to recover upon the part of one who had merely made a declaration of intention; but I think that beyond those one or two decisions the precedent was never followed in the commission. I may say that the position taken in the commissions may prove somewhat interesting to us in the future in determining the status or possible status of the inhabitants of Porto Rico, who are not recognized as citizens of the United States, but are persons entitled to the protection of the United States.

The CHAIRMAN. Are there any further remarks upon the subject of the papers just read? If not, we will advance to the second question for the evening, which is *The effect of the unfriendly act or inequitable conduct of the citizen upon the right to protection,* and on that subject we will have the pleasure of hearing from Prof. Theodore S. Woolsey.

ADDRESS OF PROF. THEODORE S. WOOLSEY, OF YALE UNIVERSITY,

ON

The Effect of the Unfriendly Act or Inequitable Conduct of the Citizen upon the Right to Protection.

Allegiance and protection, as we shall be reminded more than once during this meeting, are correlative.

They are correlated in that each implies an obligation, but with this difference, that whereas the duty of fidelity involved in allegiance is absolute and unconditional, the duty of the state to protect the person and property of its subject abroad is not absolute, but may be conditional in a variety of ways.

Thus if protection bids fair to imperil the life or vital interests of the state, the less interest must be sacrificed to the greater, and protection must be limited to a small and safe quantity. Hayti, protecting by force, one of her subjects in Germany from a real or fancied injustice, would be an example of what is meant.

Again, if the wrong suffered is so insignificant as to be out of proportion to the governmental effort involved, a state will refuse its protection. This is the dictate of common sense.

Or if the claimant has failed to use the means of redress given him by the courts of the state where the wrong has been committed, his own government will stay its hand. Protection is not yet due.

Our own government also denies protection to those citizens who by reason of long residence abroad, nonpayment of taxes at home, the education and settlement of their children out of the country, or any fact which is to be fairly construed as self expatriation — as a denial of allegiance by nonperformance of its duties — have severed the tie which bound them. And in the case of naturalized citizens returning to their country of origin, this expatriation is comparatively quick and easy. Two years time will effect it by the specific treaty with the North German Union of 1868, and under the general act approved March 2, 1907.

There is one more case where protection is usually denied, namely, if the subject takes part in a war between states with which his own country is at peace. Here, in violation of the obligations of neutrality, he takes his life in his own hands and his protector is relieved of its obligation.

Thus much I premise without citing authority, first to show how very varied are the instances where protection is not due or at least is not customarily given, and, second, to ask whether still another such deprivation may result from impropriety of conduct on the part of the subject.

Let us examine this question in the conventional fashion, first in the light of reason, second as governed by precedent. And a few publicists have expressed themselves more or less directly on the point at issue with *dicta* not to be overlooked.

We assume that a man has voluntarily placed himself under the

jurisdiction of a foreign state. That state may attack his property relations or his person. In the first case we meet a condition which is sufficiently familiar: a broken contract, property confiscated, unusual taxation, trade discrimination, judicial remedy denied. Unless such an attack upon his property rights is intended as a penalty for a personal act, confiscation to punish for insurrection for instance, it is not germane to the present inquiry. If it is such a penalty, it will probably be in lieu of personal pains and to be similarly judged, so that we may narrow our topic still further by assuming that an offensive act has called forth a personal punishment. Is the protection of the offender's government still due or is it forfeited?

Here the nature of the act is all important. If I preach Protestantism in Spain or democratic ideals in Russia as abstract principles, and in so doing violate no law, I should not be punished for an honest expression of belief. If I denounce dictatorships in Venezuela, still abstractly, I should be borne with. But if I do any of these things in such wise as to attack established government, that is another matter, for the national right of self-defense is paramount to my right to advocate a political or social ideal. The foreign anarchist who attacks established order in Chicago may be absolutely sincere; but if the result, even the unintended result, be to encourage bomb throwing, it is a case for police suppression, and the protection of his government would be misplaced.

Still clearer is the case of the alien who conspires against a government and seeks to overthrow it by force. His movement may gain the distinction of a recognized belligerency. In such a legalized form of war, as has been said, the adventurer is alone responsible for the risks which he has assumed. But if the contest is limited to mere insurgency, it is hard to predicate greater immunity. The alien revolutionary can have no right to attack a government which the native revolutionary has not. He is not of a privileged class. This is reasonable if he visits the state to attack it. Should he dwell in it for a time and acquire domicile, the case against him is certanly not weakened thereby. But suppose, instead of favor, he finds prejudice, and on the ground of his nationality; instead of better treatment than the native, he gets worse. In case of such discrimina-

tion we may reason in two ways. We may say that the alien who conspires against the government of his residence is a pure mischief-maker and in no case a patriot. He had the world to choose from, but elected to come to this spot. He abused the hospitality given him. His conduct is without excuse because based upon no legitimate motive. He should be worse treated than the native whom leniency may turn to repentance. Or we may say that if his treatment argues an unfriendly disposition toward the state to which he owes allegiance, that state may resent the fact, and will do so by trying to protect him from the threatened consequences. Or, as Wharton expresses it, " Citizens of the United States when abroad, will be protected from discrimination aimed at them on account of their nationality." (II, p. 700.)

To the writer it appears that such protection is legitimate and due, but only when the prejudice on the score of his nationality is beyond question; moreover, that such prejudice can not be reasonably inferred from severities in one case. After several instances of such discrimination have occurred against men of the same nationality, the bias is clear and may be resented. So long, however, as all alien revolutionaries are treated like the native or are treated alike, protection is not due. Yet to this conclusion there must be exception if the severities are in violation of humanity. During the two Cuban insurrections, had Spain threatened to execute all aliens captured in service under the Cuban flag, their governments should have protected them. It would have been a barbarity not to be excused because aimed at all nationalities alike. But closer imprisonment or refusal to parole, applied to the alien and not to the native, would have been justified unless visited upon Americans alone. The *Virginius,* captured off the Cuban coast in 1873, is a case in point. Her crew, British and American alike, day by day were court-martialed and shot until a British officer in Santiago harbor, with his guns trained on the town, stopped the brutal process and gave protection to the survivors for humanity's sake. As for our own people, there was a violation not only of humanity, but also of Article VII of the Treaty of 1795, which provided reciprocally for free access to the courts of justice and for

right of counsel. This provision was specifically restated in the Protocol of 1877, "except for those captured with arms in their hands." So that in the *Competitor* case in 1896, through the insistance of Mr. Olney, the *Virginius* barbarities were not repeated. Had no such treaty or protocol existed; had the crew of the *Virginius,* consisting of both British and American subjects, been separated into classes according to origin; had the Americans alone been imprisoned, it would illustrate my point, justifying protection against inhumanity and against racial discrimination.

Thus taking as typical the case of a foreign subject engaged in insurrection against the established government of a friendly state, I argue that: (1) he is liable to all the risks of the situation on a par with the native; (2) he may perhaps even be discriminated against because less excusable than the native; (3) yet by his treatment humanity must not be violated; (4) nor may he stand on a worse footing than other aliens, although self-defense will justify a good deal of severity.

Let us stop here to cite a few opinions which bear upon what has been said:

Oppenheim (I, p. 374) pronounces protection not a duty, but "absolutely in the discretion of every state." How protection shall be afforded a subject, must take into account, "whether his behaviour has been provocative or not" (p. 375), and he adds that an alien is entitled to "equality before the law" with the citizen "as far as safety of person and property is concerned" (p. 376).

Hall (5th ed., p. 279) allows a state to interfere in behalf of a subject abroad who voluntarily subjects himself to said foreign jurisdiction "only when those laws are not fairly administered, or when they provide no remedy for wrongs or when they are such * * * as to constitute grievous oppression." "When an injury or injustice is committed by the government itself, it is often idle to appeal to the courts: in such cases and in others in which the act of the government has been of a flagrant character, the right naturally arises of immediately exacting reparation by such means as may be appropriate." He adds that so much depends upon the

special circumstances of a case as to make it useless to lay down more than the very general principle. But when a subject of A is domiciled in B, "the right of his state to protect him is somewhat affected" (p. 282).

Snow (p. 57) would shade the measure of protection according to the state which is its object. He classes states as "stable, weak, or barbarous." In weak states "citizens or subjects of one state merely entering into the military or naval service of a foreign country, do not thereby lose their citizenship; but if they engage in warlike measures or in an attack upon the government in whose jurisdiction they reside, they forfeit claim to the protection of their own government."

These citations agree that protection is not an unvarying hard and fast obligation on the part of the state, but will depend upon circumstances and imply that one of these circumstances is the conduct of the person seeking protection. They agree also in declining to lay down a specific rule to govern protection.

What, now, can we learn from precedent? For reason without the backing of precedent is but a vain thing for guidance in a field of action where usage governs. Schouler relates the Ambrister-Arbuthnot affair as follows: Ambrister, an ex-lieutenant of British marines, and Arbuthnot, a shrewd old Scotch trader, were captured by Jackson in 1818 during the war with the Seminoles. Florida was still Spanish. These two men were charged with complicity in the Indian attack upon the United States, Ambrister having been taken in arms while the evidence against Arbuthnot was circumstantial. They were tried by court-martial and condemned to death. This penalty was commuted by the court to stripes and imprisonment in Ambrister's case. Nevertheless, Jackson executed both men on the ground that "an individual making war against the citizens of any other nation, the two nations being at peace, forfeits his allegiance and becomes an outlaw and pirate." I use Jackson's own language, which as a statement of law is hardly scientific or exact.

The respective governments took up the case. These Indians had

committed atrocities, had massacred women and children, and it was believed that the two British subjects had helped them to arms and incited them to action. Wharton says:

Two important circumstances also are to be considered in forming our estimate of the finding of the court. First, the members of the court were men of high character who from their participation in this very campaign were cognizant of the kind of warfare which the accused were charged with instigating; secondly, the British Government after a careful investigation of the facts, if not acquiescing in the rightfulness of the action of the court-martial, at least made no complaint of it as involving a violation of international law. (Wharton's Digest, Vol. III, p. 328.)

While Adams, Secretary of State, declared that Jackson "might by the lawful and ordinary usages of war, have hung them both without the formality of a trial."

But the British public was not so acquiescent as the British Government, for, as Rush wrote, excitement ran high, stocks fell, Jackson was tampooned and vilified and the American Government denounced. Lord Castlereagh told Rush afterward that war "might have been produced on this occasion if the ministry had but held up a finger."

Here two subjects of one state entered another, joined in a savage fray against a third with which their own country was at peace, were captured, court-martialed and executed. But the fact that they had identified themselves with barbarous warfare gave less reason for protection, while the equality of the states involved made anything more than remonstrance a serious business, and policy may have outweighed other considerations. Still it was strange, if law was violated and wrong done, that not even remonstrance should have been offered; and one British writer declares that although Ambrister's punishment was atrocious, it was a question between Jackson and his own government.

So far as American filibusters are concerned, our government has declared its intention to let them take the consequences pretty explicitly.

In 1849 President Taylor warned certain citizens reported to be bent upon an invasion of Cuba that they must not expect "the inter-

ference of this government in any form in their behalf, no matter to what extremities they may be reduced in consequence of their conduct." (Proclamation of August 11, 1849.) Two years later Fillmore used identical language. In 1887 Mr. Bayard, while Secretary of State, declared that "a party whose goods are confiscated as tainted with insurgency, can not claim compensation if he was himself implicated in such insurgency." (Moore's Digest, III, p. 789.)

The capture, court-martial, and summary execution of two Americans, Groce and Cannon, fighting on the side of the insurgents in Nicaragua, in November, 1909, bears a strong resemblance to the Ambrister-Arbuthnot case. As to two facts the writer is not informed. Were these men domiciled in Nicaragua, where one at least is said to have owned property? And did they, as charged by Zelaya, but denied by others, carry on war in an unusual or barbarous way? For purposes of argument, I assume that Zelaya's charge was false and that both men were under Estrada's orders, commissioned by him and fighting in a normal legitimate fashion.

They seem to have been worse treated than their fellow insurgents who were natives, but was this discrimination on account of their nationality? It is unsafe, though pleasant, to generalize from a single instance.

In this Nicaraguan episode, had these men fallen in battle, as young Osgood did in Cuba, or had they been imprisoned and their property confiscated, no objection could have been made. In view of what did happen the question is twofold. Was their execution by martial law in violation of humanity, unjustified by the laws of war? Was it a proof of an unfriendly disposition toward the United States? Insurgents who carry on war in conformity with the rules of civilized warfare, are entitled to be treated in conformity with those rules. These men held commissions in the insurgent army which entitled them to be considered prisoners of war. To shoot them was to violate the laws of war. But that this barbarity was on account of their nationality is probably not susceptible of proof. On the first ground, according to this reasoning, protection, or failing protection, reparation was due.

The execution of Cannon and Groce was too speedy to make their protection feasible, but the Administration showed displeasure by giving the Nicaraguan Chargé his papers, by demanding satisfaction, and by sending a force to Nicaraguan waters, all of which combined seems to have influenced Zelaya's resignation of the presidency and subsequent withdrawal. The United States Government announced as its last word its intention of holding "personally responsible the men who were to blame for the torture and execution" of its subjects. Whether this means the agents, the principal, or nothing at all, is not clear.

These two precedents, so far as the action of the United States goes, are not in harmony. Our government justified the execution of one pair and denounced the execution of the other, under conditions not essentially dissimilar. My judgment is that Jackson erred, and that Zelaya followed a bad example. In both of these cases there was a substitution of trial by court-martial for trial by the civil courts.

There is another class of cases of a less serious nature, which incidentally involve the topic we are discussing — protection as affected by misbehavior — in which the application of martial law to aliens in a disturbed time and region is likewise a factor.

For example, one Carroll, a British subject, in 1862, had railed against the Northern Government in Baltimore and was arrested by the military authorities. In the correspondence with the British Government which ensued, it was agreed that Carroll should be released if he would leave the country not to return during the continuance of the rebellion. (Moore's Dig., II, 195.)

Dubos, in New Orleans, a French subject, sought and got damages because General Butler had imprisoned him in violation of the laws of war and of his own proclamation of martial law. The case of Le More was similarly treated. Both were under suspicion, but were too harshly treated and reparation made under the treaty of 1880. (Moore's Dig., II, 195, 196.)

In 1895 a number of American citizens lent aid to a royalist rising in Hawaii against the newly formed republic. They were arrested, tried under martial law and variously sentenced. The

United States Government insisted that "martial law, though altering the forms of justice, could not supersede justice itself, and demanded stay of execution" until it had the chance to examine and approve the trial. (Cleveland's Message of December 2, 1895.) The Hawaiian Minister of Foreign Affairs denied that a right of review belonged to this country, but the sentences were for the most part commuted.

The Waller incident in Madagascar occurred also in 1895. Waller had been United States Consul at Tamatave, but was replaced, yet remained at the capital through its bombardment and capture by the French.

Besides a technical offense, he was charged with trying to inflame the Hovas against the French and to furnish them with information of a military nature. He was tried and convicted by court-martial, his case examined by Mr. Eustis in Paris who reported adversely, but finally his release was granted as an act of clemency. (Moore's Dig., II, p. 204 *et seq.*)

In all these cases there was, or at least was charged, impropriety of conduct on the part of the individual, yet each government concerned carried protection to its subject so far as to examine the offense, the trial and the penalty, and almost uniformly it was able to modify the latter.

To simplify this discussion, two extreme cases have been taken as typical. Is protection still due to one's subject, although found in arms trying to overturn a friendly power? Only, I venture to assert, when his treatment violates humanity or shows proof of national animosity. Even a diplomatic agent forfeits his immunities if he conspires against the country to which he is accredited.

But there are other cases where neither offense nor penalty are so grave, yet both are of a personal nature and raise much the same question.

Our fishermen for a century have occasionally poached in Canadian coast waters and have suffered for so doing. And where they violate the provincial revenue laws they pay the penalty. The degree of protection given them is only such as will guarantee a just trial and fair treatment. Thus when the Canadian fishery patrol

in 1815 besides guarding closed waters, forbade also approach to within sixty miles of them, this unwarranted claim to jurisdiction over the high seas met with our protest and was withdrawn.

That no subject of the United States within foreign jurisdiction, even if he wear its uniform, will be protected in a violation of the law is perfectly clear. Moore's Digest gives the case of a midshipman from the *U. S. S. Mohican* landed in a Brazilian port who fired his pistol at one of his boatmen trying to desert. The young officer was first arrested, then discharged with a reprimand. Of this his captain complained as an offense to his officer's dignity and to our flag. But our minister very sensibly doubted this view and appealed to Washington. Mr. Seward replied — this was in 1867 — that the midshipman's act "was a breach of the peace, offensive to the dignity of Brazil, which the government of that country may well expect the United States to disallow and censure. * * * The United States are not looking out for causes of complaint against foreign states." And if memory serves, two officers of our navy in a café in Venice misbehaved and escaped local penalties, not through the protection of their own, but by the grace of the Italian Government.

In the assaults upon the seamen of the *U. S. S. Baltimore,* on shore leave in Valparaiso, the complaint of our government was that the seamen's conduct was exemplary, that the concerted attack upon them in several places showed hostility to our flag, and that the trial of the assailants was but half-hearted. Protection was justified and was given, though in a spirit and with a distrust of Chilean law and good faith which gave much offense. In punishing mob violence to aliens, we are hardly in a position to throw stones.

I think we may fairly conclude from the cases cited that the subject of one state under the jurisdiction of another does not by impropriety of conduct sin away his right to protection. It exists as before, though under the conditions which his country's policy may lay down. But it should be exercised not in exempting him from a penalty incurred, but rather in seeing that his trial is a fair one and that the treatment accorded him is neither inhuman nor aimed at his nationality. By reason, and by the opinions of writers so far

as they have expressed themselves, it is believed that this conclusion is confirmed.

The CHAIRMAN. The subject-matter of Professor Woolsey's interesting paper will be pursued by Mr. Arthur K. Kuhn.

ADDRESS OF MR. ARTHUR K. KUHN, OF NEW YORK CITY,

ON

The Effect of the Unfriendly Act or Inequitable Conduct of the Citizen upon the Right to Protection.

Allegiance is defined by David Dudley Field in his Draft Code of International Law (section 261) as "the obligation of fidelity and obedience which a person owes to the nation of which he is a member, or to its sovereign." At one time, by virtue of a rule of the common law, allegiance was perpetual, and the subject could no more sever the bond which united him to the country of his allegiance than the serf could move from the land to which he was bound by feudal law. The doctrine of allegiance to a particular sovereign in contradistinction to that of loyalty to a universal empire is itself of feudal origin. Under the influence of a feudal society, gradually crystalizing into independent sovereignties, the relation developed in mutuality (Cogordan, *La Nationalité*, p. 6) and the obligation of obedience, which it involved, was conceived as a sort of *quid pro quo* for the subject's reciprocal right to protection.

Though it would be misleading to apply the ordinary principles of private contract to the public status existing between the subject and the state, the very *raison d'être* of the state is acknowledged to be protection, in the broadest sense, of the individuals composing it. It is for their happiness and welfare that the state exists. Thus, conceiving the state as a moral entity, we speak of its *obligation* of protection. As was said by Hubert Languet as early as 1579 (*Vindiciæ contra tyrannos*, cited in Hill, History of European Diplomacy, vol. II, p. 517) sovereignty is "not an honor but a trust, not an immunity but a duty, not an exemption but a mission."

As we have said, the relationship of the subject to the state was once considered indissoluble without the cooperation of two elements, the act of the subject and the consent of the sovereign. In the United States to-day expatriation is declared to be "a natural and inherent right of all people" (Act of Congress, July 27, 1868, U. S. R. S., § 1999). The old rule was long ago abrogated in Great Britain as well, and the tendency of modern legislation elsewhere, as our president pointed out last night, seems definitely pointed in that direction (*e. g.*, Belgium, Law of June 8, 1909).

The subject to which I address myself is that of the effect of the unfriendly or hostile conduct of the citizen toward a foreign nation upon his right to protection by his own. By some act, formal or informal, particularly prescribed by the municipal law of the nation to which he owes allegiance, the subject may, by virtue of the doctrine of voluntary expatriation, break the bond which unites him to that state and thus absolve it from all further obligation of protection. As between the subject and the state, the national legislation alone decides the national character. The nature of some of that legislation has been discussed under Topic 2 of the *Questionnaire*. There we were dealing with a matter of status. Here we are not. Under Topic 1, we have considered how far the citizen is deemed to have waived, by express stipulation, the right to protection within the territory of a foreign state. We are now to consider how far he may be deemed to have lost it through conduct equivalent to a waiver implied by law.

It is important to distinguish sharply between the loss of national character, which is citizenship, and the loss of the right to protection, which is only one of the incidents of citizenship. The former constitutes a change of status; the latter does not.

It follows as a corollary to the equality of states and the comity that exists between them, that an act done against the peace or integrity of a foreign state, with which the native state is in amity and friendship, is an act disloyal to the native state. The doctrine was well expressed by Mr. Justice Taney rendering the opinion of our Supreme Court in *Kennett* v. *Chambers*, 14 How. (1852) 38, in an action to recover damages for the breach of a contract made prior to

the recognition of Texas in aid of the movement which culminated in its independence (at p. 50):

For as sovereignty resides in the people, every citizen is a portion of it. * * * And when that authority has plighted its faith to another nation, that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. * * * And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen and the breach of the faith pledged to the foreign nation. And if he does so, he cannot claim the aid of a court of justice to enforce it.

The doctrine has been repeatedly recognized in England (*Thompson* v. *Powles,* 1828, 2 Sim. 194; *De Wutz* v. *Hendricks,* 1824, 9 Moore, 586), and contracts by which financial assistance is rendered to insurrectionary movements, no matter how far advanced, short of actual belligerency, are deemed "contrary to the law of nations" and against public policy (Lord C. J. Best in *De Wutz* v. *Hendricks, supra*).

The significance of these decisions is that they judicially define the duty of the subject embraced in his allegiance, and withdraw from him, as a penalty for his violation of that duty, the protection and assistance afforded by the tribunals of his native state.

If such be the attitude of the judiciary, it is but natural that where the citizen seeks to enlist the cooperation of the political department of his government, an equally rigorous test should be applied. For, where the even tenor of peaceful relations has been compromised by the act of the citizen, it is precisely the political department of the government upon which may ultimately fall the burden of diplomatic explanation or reconciliation.

The following cases are illustrative of the doctrines maintained in our relations with foreign nations, where protection has been denied, in whole or in part, by reason of the unfriendly or hostile conduct of the citizen.

One Tripler, a resident of Mexico during the French intervention, presented a claim against Mexico for losses suffered by him

during the disturbances of 1858. It was proved that he had furnished money and arms to the reactionists and had actively assisted the cause of the imperialists. The claim was dismissed by the arbitrators to whom it was referred because, as stated in the opinion of Sir Edward Thornton, as Umpire,

> the claimant did not preserve that neutral character which was to be expected of him as a foreigner, and failing which, his government was not bound to support him.[1]

It is not essential that the trespass should have been committed upon the government against which the claim is made. Thus no compensation was awarded to the representatives of Captain Clark, an American citizen commissioned as a privateer in the service of the successful revolutionary party which afterwards constituted the Republic of Uruguay. In the course of hostilities with the parent state, he had gained certain prizes which were unlawfully seized by the Republic of Colombia, a neutral state. The claim was finally pressed against Ecuador, New Granada, and Venezuela as successor states. Though no unfriendly act had been committed by the testator against Colombia, or its successor states, the claim was disallowed by reason of the violation of the neutrality of the United States toward Spain and Portugal who were no parties to the arbitration at all.

> It would be against all public morality and against the policy of all legislation, if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties, and on the perpetration of outrages committed by an American citizen against the subjects and commerce of a friendly nation.[2]

Though the general principle has received broad recognition, much difficulty is encountered in the determination of a proper penalty for the violation. It is obvious that the foreign state will often be inclined to inflict a harsher penalty than the offense merits or the native state deems proper under the circumstances.

In reviewing the court-martial against Arbuthnot and Ambrister,

[1] Moore, International Arbitrations, pp. 2823–4.

[2] Opinion by Hassaurek, Commissioner, concurred in by Sir Frederick Bruce, Umpire. Moore, International Arbitrations, p. 2739.

two British subjects captured in 1818 by United States forces, General Jackson made the following rather startling pronouncement:

It is an established principle of the law of nations, that any individual of a nation making war against the citizens of any other nation, they being at peace, forfeits his allegiance and becomes an outlaw and pirate.[3]

Arbuthnot was found guilty of "aiding and comforting the enemy and supplying them with the means of war;" Ambrister, of "levying war against the United States" by taking command of hostile Indians and ordering part of them "to give battle to an army of the United States." After a fair trial lasting two days, before a military court composed of officers of high rank, both prisoners were sentenced to be shot. The British Government, upon a careful investigation of the facts, though not acquiescent, at least made no complaint of the sentence, or its execution, as constituting a violation of international law. Feeling ran high in England, however; the United States was roundly denounced by the opposition in Parliament, and Lord Castlereagh stated to our own Minister, Mr. Rush, that a war might have been produced between the United States and England "if the Ministry had but held up a finger."[4]

The sentence can not be sustained upon the reasons advanced by Jackson. The subject of a peaceful neutral power does not forfeit his allegiance, or become an outlaw, by volunteering with a belligerent pursuant to the laws of Great Britain, of the United States, or of most other nations. It is true, the rule in France under the Napoleonic code is otherwise (Code Civil, Art. 17). As we have said, allegiance results from a status created by national public law and can not be divested except pursuant to that law. It was the protection of the British Government which had been forfeited in the cases mentioned and that, too, only after the British Government had examined the facts for itself. The extreme sentence was manifestly considered justifiable because of the *savage* nature of the warfare in which the prisoners had engaged and for which they were partly responsible, and because the atrocities committed by the Indian

[3] Wharton's International Law Digest, Sec. 348*a*.
[4] Wharton, *ibid.*

party demanded reprisals in kind. On this ground the sentence is sustainable. As Wharton points out, such a struggle can not be denominated as war, but as an "organized system of assassination and rapine," according to which those inciting it may be regarded, not prisoners of war, but accessories before the fact.

But hostile conduct to a friendly power will not always cause the parent state to completely disown its errant child. This was established by the awards in the arbitration with Mexico growing out of the so-called *Zerman* filibustering expedition in 1855. Though fully recognizing the unlawful character of the expedition under the laws of the United States and international law, the Umpire, Sir Edward Thornton, considered

> that the United States have a right to expect that one of their citizens, even when accused of crime against the laws of Mexico, should receive proper treatment at the hands of the authorities.[5]

Accordingly, in the cases of *Dennison* (Moore, Int. Arbitrations, p. 2758), *Dolan* (*Ibid,* p. 2767), and *McCurdy* (*Ibid,* p. 2769), though indemnity for the confiscation of the property of the prisoners was denied, awards were nevertheless made in compensation for the delay in bringing them to trial and for the unduly severe and cruel treatment to which they were subjected. Similarly, when the remedy resorted to is expulsion, it is generally recognized that though "the right of expulsion is absolute and inherent in the sovereignty of a state," nevertheless, even though the unfriendly act of the foreigner has rendered his expulsion a justifiable remedy on the part of the state, "it is to be accomplished with due regard to the convenience and the personal and property interests of the person expelled" (Mr. Olney, as Secretary of State, in the *Hollander* case, U. S. Foreign Relations, 1895, p. 775). The language of Mr. Olney in the *Hollander* case was specifically referred to and applied by the Italian-Venezuelan Commission in the *Boffolo* case (Venezuelan Arbitrations of 1903, Ralston's Report, p. 700) and by the Netherlands-Venezuelan Commission, in the *Maal* case (*Ibid,* p. 915).

[5] Moore, International Arbitrations, p. 2758 *et seq.*

The citizen's right of protection in such cases has obviously not been completely forfeited, though its force may have suffered what might be denominated as a partial paralysis by reason of the citizen's own conduct. This is especially true where the act of the citizen is not overt, but consists in conduct of indirect hostility, such as the publication of articles deemed unfriendly or seditious. It still remains the duty of the native state to insist that the punishment shall, in a measure, " fit the crime."

Attelis, Marquis of Santangelo, a naturalized citizen of the United States, was expelled from Mexico in 1835 for publishing a periodical in which appeared certain articles unfriendly to Mexico and tending " to ridicule the nation and plunge it into anarchy." The expulsion was legal according to Mexican law and the commission to which the claim was referred so found. Notwithstanding this, an award was made because the penalty of expulsion was considered disproportionate to the gravity of the offense (Moore, Int. Arbitrations, p. 3334). A similar claim arose *against* the United States by reason of the imprisonment at New Orleans of one Dubos, a French citizen, by federal military officials during the Civil War, for publishing a periodical devoted to " the instigation of treason and civil war against the United States." After a review of the facts, the arbitrators agreed that his arrest was justifiable in the first instance, but they awarded compensation because of the failure of the commanding officer to grant a military commission (Moore, Int. Arbitrations, p. 3319).

The duty of the citizen while within a foreign state in which an insurrection or civil war is in progress represents perhaps the most difficult phase of our topic. Where the parties to a contest are two belligerent states, precedent, as well as the present conventional law under the Hague rules, requires that all persons forming part of an organized force, under an emblem, and carrying arms openly, are entitled, when captured, to be treated as prisoners of war (Regulations respecting the laws and customs of war on land, Art. 1). The history of nearly all modern warfare records the participation of certain combatants of nationality foreign to either side. The experience in the wars to which the United States has been a party

is not essentially different in this regard. During the Revolution the British army contained large bodies of foreign auxiliaries and that of the United States was assisted by French officers and men. In the Civil War, persons of foreign nationality were to be found on both sides of the contest. Where both parties enjoy belligerent rights, the conventional rules apply. But where one of the contending parties is without recognized belligerent character, the treatment to be accorded to captured persons or property is often a matter of much difficulty. The tendency of established government everywhere is to treat all rebels as outlaws or pirates, and because of the customary bitterness of internecine strife, it is particularly important that even culpable conduct of the citizen should not be deemed an absolute forfeiture of national protection.

During the earlier stages of our own Civil War, Mr. Seward, as Secretary of State, claimed the right to treat privateersmen, commissioned by the Confederate States, as mere pirates. Great Britain protested in strong terms and demanded that prisoners be given the rights of war upon the grounds of "reason, humanity and the practice of nations" (Parliamentary Papers, 1862, North America, No. 1, p. 137, cited in Wheaton, International Law, 1863, p. 253, note). The extreme position of Mr. Seward was soon rightly and fortunately abandoned. Riquelmé well says:

> This subjection to the law of nations is the more necessary in civil wars, since these, by nourishing more hatreds and resentments than foreign wars, require more the corrective of the law of nations in order to moderate their ravages.[6]

It is often difficult to discern precisely what constitutes a civil war, or a general insurrection. It is a fact for the political department to determine, and when so determined, constitutes what Dr. Wharton described as a "recognition of insurgency." It distinguishes between lawlessness without warrant and the right of persons to strive for what they believe their right of governing themselves, sometimes denoted "the sacred right of revolution." It establishes a condition recognized by our Supreme Court in the case of the

[6] Elementos de Derecho Publico, Chap. 14, Tom. 1, p. 172; cited in Lawrence's Wheaton, p. 524.

Three Friends, 166 U. S. (1896), p. 1, and in *Underhill* v. *Hernandez,* 168 U. S. (1897) 250, of war in the *material* sense as opposed to war in the *legal* sense. Neutral nations must remain neutral toward both parties to such a conflict. A citizen engaging on either side is guilty of a breach of that neutrality. By proclamation in 1849, President Taylor warned all citizens of the United States that when aiding the insurgents in Cuba they must not expect "interference of this government in any form on their behalf, no matter to what extremities they may be reduced in consequence of their conduct" (5 Richardson's Messages and Papers of the Presidents, p. 7). The extreme terms of this proclamation are not warranted either by diplomatic precedent or by the requirements of international obligation. President Cleveland, in 1895, issued a proclamation to accomplish a similar purpose, though in more measured terms (*Ibid,* Vol. 9, p. 591).

Attention was directed anew to this phase of our topic in November of last year (1909) when two citizens of the United States, Cannon and Groce, were shot to death upon the personal order of the chief executive of Nicaragua, after they had been captured in open warfare. Had they been killed in battle no claim could have prevailed either against the established government, in the event of confiscation or destruction of their property, or against the revolutionary party for services, in case it had prevailed (*Young's case,* Moore, Int. Arbitrations, p. 2752). According to President Taft's Annual Message:

> They were reported to have been regularly commissioned officers in the organized forces of a revolution which had continued many weeks and was in control of about half of the Republic, and as such, according to the modern enlightened practice of civilized nations, they were entitled to be dealt with as prisoners of war.

The position thus taken by our President has been criticised by an English writer in the *Law Magazine and Review* (February, 1910, p. 204) on the ground that the United States can not "treat a government at pleasure as a sovereign exercising municipal powers of repression, and as a combatant waging measured war with an equal." The writer seems to be unaware that the principle which

he opposes is recognized by the leading authorities of his own country. Hall well says:

As soon, it is said, as a considerable population is arrayed in arms with the professed object of attaining political ends, it resembles a state too nearly for it to be possible to treat individuals belonging to such population as criminals;[7] * * *

The drastic results of a recognition of complete belligerent rights, so ably summarized by Mr. John Bassett Moore (*Forum*, May, 1896, at p. 298) embracing the waiver of damage done to property by the insurrectionaries, submission to blockade, visitation, search and seizure, indicate the necessity of an intermediary status between mere brigandage and belligerent warfare.

Furthermore, a nation owes no duty to a foreign state to take affirmative steps to prevent its citizens, *qua* individuals, from enlisting in a hostile army. It may well be that the citizen becomes thus guilty of disloyalty to his native state, but if his noxious acts have been repressed with undue severity by the foreign state, it lies with the native state to judge how far its subject has lost the right to its protection.

The only duty of the individual is to his own sovereign; and so distinctly is this the case, that acts done even with intent to injure a foreign state are only wrong in so far as they compromise the nation of which the individual is a member.[8]

Mr. Webster wrote to Mr. Thompson, our Minister to Mexico, April 15, 1842, subsequent to the ill-fated *Sante Fé* expedition, that when American citizens were captured with the enemies of Mexico

it is still the duty of this government to take so far a concern in their welfare, as to see that, as prisoners of war, they are treated according to the usage of modern times and civilized nations.[9]

Mr. Fish, while Secretary of State, wrote to Mr. Williams, our Minister to China, July 29, 1874, that citizens of the United States have a right to engage in the military service of foreign powers,

[7] International Law, 6th ed., pp. 30–31.
[8] Hall, *ibid*, p. 77.
[9] Webster's Works, VI, p. 436.

Christian or non-Christian, and in such cases, while the Government of the United States will not take cognizance of their death in battle, it will expect

that no unusual or inhuman punishment be inflicted upon any of its citizens who may be taken prisoners, but that they shall be treated according to the accepted rules of civilized warfare.[10]

We have seen in the *Zerman* case that the denial of justice may give rise to a right of reparation even though the citizen has otherwise forfeited his right to protection. We refer also to the famous case of *The Virginius* in which this doctrine was recognized by Spain through direct negotiation and agreement. The principle was, it is true, lost sight of by the Umpire, M. Bartholdi, in the *Wyeth* and *Speakman* cases decided in 1876 (Moore, Int. Arb., p. 2777), a result to which the unmeasured language of President Taylor, in the proclamation already referred to, largely contributed, and on which, in fact, reliance *in hæc verbi* was laid by the advocates of Spain. We will not, however, intrench upon this branch of the main topic, as the same is to be discussed under its appropriate heading (Topic 5).

We wish to conclude with the remark that culpability on the part of the citizen can not be predicated in law until some competent tribunal, military or otherwise, has spoken. To justify punishment without right of reparation on the ground of hostile conduct, by a determination of the facts *nunc pro tunc,* after the accused lies dead in the grave, does not appeal strongly to the American sense of justice, nor does it conform to that standard of equitable and humane conduct among nations which has come to be known, under certain sanctions, as international law.

The Chairman. Are there any remarks on the papers just read or the subjects to which they refer?

Prof. Woolsey. I might say just a word. I can not, of course, guarantee that the account I gave of the court-martial of Groce and Cannon is accurate. I took it from the *London Times.* I chose

[10] For. Rel. 1874, p. 300; cited 6 Moore, Digest of Int. Law, 920.

that source of information because it was presumably unprejudiced and is apt to be accurate. I can not guarantee it.

Mr. Butler. We have listened with great pleasure to these very interesting and edifying papers. It occurs to me that the right of an alien, domiciled abroad, to a fair trial is almost on all fours with the question which constantly arises in the determination, by the highest court of this land, whether or not one party, in a State court, has been denied due process of law, under the Fourteenth Amendment. In such a case the guilt or innocence of the plaintiff in error is never taken into consideration. The question is whether the accused was granted a fair trial, in accordance with due process of law, as the same has been defined.

If the case in which the accused has been convicted is one wholly within the cognizance of the State, and his trial has been in accordance with the State practice, the federal court does not interfere; but if in any way "due process of law," as defined, has been violated, the accused is then granted a new trial. In all cases a hearing and an opportunity to have the crime presented with sufficient distinctness to enable the accused to defend and to defend in accordance with the law of the locality, is the question.

It seems to me that, under international law, almost the same rule should apply. As suggested by the last speaker, certainly the question of culpability can not be decided after the execution. The fair trial must precede execution. In fact, within the last ten days the Supreme Court has held a State statute to be illegal and unconstitutional because it required a railroad corporation to spend money on its roadbed on the application of any one of a certain class, whether it was reasonable or not, there being no opportunity in advance to enable the person against whom the charge was made to go before a proper tribunal and show that it was unreasonable, and if he did not do it he took the risk of being subjected to a penalty of something like five hundred dollars a day. That was held to be clearly unconstitutional and it was held that the opportunity to be heard must come before condemnation.

In the case which has been discussed, and which is the recent and

most prominent in our minds, it seems that opportunity should have been granted for a hearing, regardless of any question of expatriation or of protection; that an opportunity should have been given to those men to be heard by some tribunal, either military or civil, in accordance with the law of the land. They should have had an opportunity to be heard and, if necessary, to appeal to the only power that could have given them protection.

The CHAIRMAN. Are there any further remarks upon the question now before the Society? If not, the Society will adjourn.

Mr. BUTLER. Before adjournment, I would like again to refer to what I said this afternoon, to the effect that to-morrow at 12 o'clock, in the chamber of the Supreme Court of the United States, the memorial exercises over the late Mr. Justice Brewer, who was originally one of us, and who at the time of his death was a continuing vice-president, will be held, and I was asked to give notice of it at this meeting of the Society, so that the Society may attend and participate in the ceremonies.

The CHAIRMAN. Mr. Justice Brewer was one of the original founders of the Society and an active participant in its organization. He was active in its affairs from the time of its organization until the time of his lamented death. Dr. Scott advises me that he was not only one of the founders of the Society, but he was the founder of the JOURNAL. His memory, I am sure, will be regarded as sacred in the history of this Society and by all of those interested in the objects which this Society represents.

If there is no further business before the Society it will adjourn.

The Society thereupon adjourned until Saturday, April 30, 1910, at 10 o'clock a. m.

SATURDAY, APRIL 30, 1910

Morning Session.

The meeting was called to order at 10 o'clock a. m., Hon. George Gray, one of the vice-presidents, in the chair.

ELECTION OF OFFICERS.

The Chairman. The first order of business is the report of the Nominating Committee for officers of the Association.

Mr. Butler. That report has already been made and action on the report, in the way of election of officers, was set down for the first thing this morning.

The Chairman. What action will be taken on the report of the Committee on Nominations?

Mr. Marburg. I move that the nominations be closed, and that the Secretary of the Society be authorized to cast the ballot for those who are nominated.

(The motion was seconded and agreed to.)

The Secretary (Mr. Scott). The ballot is cast as directed.

The Chairman. The Secretary reports that he has cast the ballot for the officers nominated, and they are declared elected.

The Chairman. I am requested to give notice that there will be a meeting of the Executive Council at the close of the afternoon session, and also a meeting of the Executive Committee at the same time.

Are there any resolutions to be presented, before we proceed with the regular order of business?

RESOLUTIONS ON THE DEATHS OF JUSTICE DAVID J. BREWER AND JUDGE WILLIAM L. PENFIELD.

Mr. Scott. Mr. Chairman: I have the honor to present, on behalf of the Executive Council and the Executive Committee, the following resolution, in which the Society expresses its sense of

sorrow at the loss of two of its honored officers, Mr. Justice Brewer and Judge Penfield.

Before presenting those resolutions I desire to say that the Executive Committee have adopted a rule that the loss of officers of the Society, who have unfortunately died during their term of service, should be taken note of by resolution of the Society, and in pursuance of that rule I have the honor to submit the following:

Resolved, That the American Society of International Law hereby records, with profound sense of loss, the death of two of its officers during the year 1909–1910:

Hon. David J. Brewer, since 1889 a Justice of the Supreme Court of the United States, in 1896 President of the Venezuela Boundary Commission, in 1899 a member of the Venezuela Arbitration Tribunal, from its foundation a vice-president and loyal supporter of the American Society of International Law; and

Hon. William L. Penfield, Solicitor for the Department of State 1897–1905, counsel for the United States in the Pius Fund Case in 1902 and in the Venezuela Arbitration of 1903 before the Hague Tribunal, and in other special international arbitrations, from its foundation an active and valued member of the Executive Council of the American Society of International Law.

I move, Mr. Chairman, that these resolutions be adopted by a standing vote of the members present.

Mr. Gates. Those of us who knew Mr. Justice Brewer personally have specially felt his quick going from us. It may interest some of the members of the Society to know that while he died very suddenly on Monday night, on Saturday night he made his last public appearance before the Literary Society in this city and in my own house, and he chose as his topic "Certain police powers of the Government."

We noticed that he did not speak with his old animation; but I saw him in our place of worship, which happened to be the same, the next morning, and he reported himself as feeling unusually well.

He was a man of deep human-hearted sympathy to men of all classes, which endeared him especially to the class in which he dwelt. He will long be remembered and honored here, as he was loved and honored in the State of Kansas with which he was so long identified.

I think it is advisable that we should adjourn to-day as early as possible, in order that we may be present at the services in his honor and memory before the Supreme Court.

The CHAIRMAN. I can not add anything to what has been said by the proposer of these resolutions, and by the gentleman who has just taken his seat. It was my privilege to have known Mr. Justice Brewer from the time that he went upon the bench of the Supreme Court, and from that time until the day of his lamented death my esteem and regard for him constantly grew and a warm friendship developed. He was a man of such quick sympathies, so cordial in his relations to all who knew him and to those who had the privilege of calling themselves his friends, that I am sure that to all of us who were in that class his death was a real sorrow and bereavement.

He stood for what was best in the American character. He stood for what was best in our civilization and in our idea of government. The highest conception of common humanity was always dwelling in his breast and found expression whenever he had an opportunity, or was called upon, to give expression, on public occasions, to thoughts upon public matters. His loss will be adequately memorialized this morning at 12 o'clock, and I hope the suggestion just made, that we adjourn in time to participate in the observances in the Supreme Court room in honor of his judicial character, will be adopted.

If there are no further remarks on these resolutions, those who are in favor of their adoption will manifest it by a rising vote.

(A rising vote was taken, and the resolutions were unanimously adopted.)

Mr. BUTLER. I move that these resolutions with reference to Mr. Justice Brewer be presented by Professor Wilson at the meeting which is to take place at 12 o'clock, on behalf of this Society, and in that way this Society will mark the regard it bears to the late Justice Brewer, and they will be a part of the memorial proceedings, which will be published and adopted.

(The motion was seconded and agreed to.)

Mr. SCOTT. Before proceeding to the reading of the papers, I move that the Committee for the Selection of Honorary Members of the Society be called upon to report.

Professor Woolsey submitted the following report:

REPORT OF THE COMMITTEE ON HONORARY MEMBERS.

April 29, 1910.

The Committee appointed for the selection of an honorary member of the American Society of International Law for the year 1909 reports the name of the Honorable T. M. C. Asser, of Holland, Minister of State, member of the Council of State, member of the Permanent Court of Arbitration, member of the Institute of International Law, and corresponding member of the Institute of France

T. S. WOOLSEY.
J. H. RALSTON.
GEO. G. WILSON.

(It was moved and seconded that the report of the Committee be accepted. The motion was agreed to.)

The CHAIRMAN. We are to have the pleasure of hearing this morning a discussion of the subject *The place of denial of justice in the matter of protection* by Professor Eugene Wambaugh.

ADDRESS OF PROF. EUGENE WAMBAUGH, OF HARVARD LAW SCHOOL, ON

The Place of Denial of Justice in the Matter of Protection.

That a nation has the right and the duty to give protection to its citizens even when they are abroad is a doctrine wholly devoid of novelty. This is obvious from the practice of the Roman Republic two thousand years ago. There are several pertinent passages in the orations of Cicero. Two extracts from his attack on Verres for maladministration in a Roman province will suffice to show that the Roman Government protected Roman citizens in foreign countries, among other things, protected them from unjust procedure in the courts. The first is this:

If any king, if any foreign state, if any people had done to Roman citizens anything like this, would we not publicly seek redress? Would we not wage war? Could we permit this injustice and disgrace to the Roman name to go forgotten and unpunished? How many great wars do you think our ancestors undertook because Roman citizens were said to have been dealt with unjustly, shipmasters detained, merchants plundered?[1]

The second is this:

Verres, if you had been seized in Persia or in the farthest corner of India, and had been dragged off to punishment, what other cry would you have raised than "I am a Roman citizen!" And if that noble and illustrious title of citizenship would have availed you, a stranger among strangers, among barbarians, among men at the very ends of the earth. . . .[2]

But I have quoted enough for my purpose.

Cicero, it will be noticed, did not analyze or classify the instances wherein there was interposition. He merely pointed out that as to matters of all sorts the dignity of the Roman Republic required an insistence upon just treatment for Roman citizens in all parts of the world. Even Grotius did not in this matter indulge in analysis or classification. After quoting from Cicero and other authors, he simply added:

But yet it is not always, even if the cause of a subject be just, that it obliges the rulers to enter upon a war; but then only, if it can be done without the damage of all, or the greater part, of the subjects.[3]

Pufendorf, like Grotius, dealt with this subject as part of the general head of causes of war; and, though he dealt with it at considerable length, his chief contribution was his pointing out the theory upon which a government is held responsible for wrongs done by individuals, as to which matter he said:

And the governours of commonwealths are presumed to know what their subjects openly and frequently commit, unless the contrary of it be manifestly proved.[4]

[1] Cicero, *In Verrem Actio Secunda, lib.* V, *cap.* 58.

[2] *Ibid, lib.* V, *cap.* 64.

[3] Grotius, *De Jure Belli ac Pacis,* II, 25, 2 (Whewell's translation).

[4] Pufendorf, *De Jure Naturæ et Gentium,* VIII, 6, 12 (Kennet's translation).

It would be easy to trace the growth of the literature; but the present purpose, in accordance with the general scheme of papers to which this paper belongs, is merely to point out, somewhat after the fashion of the analytical jurists, what is the place which denial of justice occupies in the more general topic of protection to citizens residing abroad. The purpose, then, being analytical rather than historical or descriptive, the result to be achieved will be, as far as is practical, a definition of the senses in which the phrase denial of justice is used and a very brief indication of those general principles which are naturally developed by making such an analysis.

Denial of justice has at least two meanings. The wider meaning includes the shortcomings — that is to say, the misconduct or the wrongful inaction — of any one of the three departments into which Aristotle [5] divided government, namely, the executive, the legislative, and the judicial. Justice may be denied by the executive department in many ways, and, among others, by refusing to perform its contracts, provided there is no redress in the courts,[6] or by seizing persons or property, with the same proviso,[7] or by merely neglecting to use due diligence to prevent mob violence and the like depredations.[8] Justice may be denied by the legislative department either through passing discriminatory laws, for example, laws preventing fair access to public schools, or through failing to pass such laws as are requisite for the equal protection of aliens, for example, laws giving to aliens, as to citizens, compensation for injuries due to the negligence of another resulting in death.[9] Justice may be denied by the judicial department through improperly giving judgment against the alien in either civil or criminal cases, or through inflict-

[5] Aristotle, Politics, book vi, c. xiv, as quoted in 1 Thayer's Cases on Constitutional Law, 1.

[6] Instances are collected in 6 Moore's Digest of International Law, 717–738.

[7] Instances are collected in 6 Moore's Digest of International Law, 756–786, 883–949.

[8] Instances are collected in 6 Moore's Digest of International Law, 791–883.

[9] This example was suggested by a Pennsylvania statute which is construed as giving, in case of death by wrongful act, a preference to such surviving relatives as are citizens; but this Pennsylvania statute is understood to discriminate merely against aliens who are nonresidents. See Maiorano *v.* Baltimore and Ohio Railroad Co., 213 U. S. 268 (1909).

ing upon him an excessive punishment, or through depriving him of proper witnesses, or through refusing him any access whatever to the courts.[10]

As has been said, denial of justice is a phrase used in two senses. In the narrower sense, the phrase is restricted to the instances where the wrong has been done through misconduct or inaction whose nature is judicial. This restricted meaning seems to be preferable to the wider one which has just now been explained; for denial of justice, at least when the expression is used by a lawyer, naturally connotes the instrumentalities whereby normally justice is secured, that is to say, courts and judicial procedure.

Nevertheless, although the wider sense of the phrase denial of justice — the sense including shortcomings by any one of the three departments — seems to be the less natural one, it certainly is not the wrong one; and, besides, an examination of the instances coming within the wider use of the phrase throws a useful light upon the principles applicable to cases coming within the scope of the narrower meaning. Indeed, a study of denial of justice in any one of the three departments of government gives material aid in studying denial of justice in any other one of these departments. Thus, it is from denial of justice by the executive department, whether exercising its civil or its military functions, that one most clearly perceives the possibility of doing the wrong either positively, through performance of improper acts, or negatively, through negligence of duties. Further, it is from denial of justice by the legislative department that one most clearly perceives the impossibility of securing a remedy otherwise than through an indemnity, and the necessity of making an appeal for redress to the executive department alone; for repeal can not atone for the wrong which has already been done, and, besides, there is no mode whereby a foreign government can approach in behalf of its citizens any department other than the executive. Finally, it is from denial of justice by the judicial department that one most clearly sees the possibility of doing the wrong either by making aliens the objects of unfriendly discrimination or

[10] Instances are collected in 6 Moore's Digest of International Law, 651–705, and 3 Moore's International Arbitrations, 3119–3160.

by inflicting injustice upon all persons whomsoever; for the courts or their procedure may, by reason of prejudice, deny justice to aliens only, or may, by reason of unskillfulness, deny justice to all.

By combining and generalizing the points thus gained through examining denial of justice in each one of the three departments, it is seen that in all departments denial of justice may be active or passive, must result in an appeal to the executive for indemnity only, and can indicate either discrimination against aliens or the treatment of aliens in a manner which, though unjust, is quite as good as that which is granted to citizens.

Here emerge the three somewhat inconsistent general theories which dominate the discussion of the denial of justice in either the wider or the narrower use of that phrase.

The first theory is that aliens have no rights which any one must respect or which their own country can properly enforce. This view, which appears to be at most a mere theory, must have had its origin partly in primitive hostility to aliens and partly in an extravagantly and precociously developed conception of territorial sovereignty. It is a doctrine conceived as an hypothesis by scholarly writers;[11] but the quotations from Cicero with which this paper began show that two thousand years ago it was a doctrine which the Romans did not permit other nations to follow,[12] and there is no necessity for proving by reason and by history that it is a view which no civilized people can hold. For the sake of brevity, it may be termed the barbaric theory.

The second theory is that aliens have a right to be protected both by the country where they are and by the country of their citizenship, a doctrine which bears some relation to the old conception that one carries around with him his own personal law, and some relation to the conception even now entertained of a sovereignty over persons rather than over boundaries, and a much more obvious relation to the discoveries that commerce is advantageous to both parties and that justice is the right of every man everywhere and that govern-

[11] For example, by Blunschli, *Le Droit International Codifie*, Sec. 386 .

[12] *Quære* whether from the existence at Rome of a *prætor peregrinus* and of respect for *jus gentium* it can be inferred that the Romans conceded justice to aliens as a matter of international right.

ments are societies organized for the purpose of making this right secure. This may be termed the moral theory.

The third theory, and the one now dominant in practice, is that the alien voluntarily residing in a country not his own must be understood to accept the ordinary risks of life in that country, that except in extraordinary instances the practices of every department of that country's government must be deemed right, or at least reasonable, and that in extraordinary instances there may be interposition by the country of citizenship for the purpose of securing humane treatment and especially for the prevention of discrimination. This third view, which may be called the practical theory, though it leads to much the same result as the first and least humane of all the theories, the one which I have ventured to call barbaric — namely, that the alien is largely at the mercy of the country of his residence — is based upon a recognition that to-day every civilized country is anxious to do justice to aliens, both from a sense of duty and from a perception of interest. This third theory is peculiarly appropriate when one is dealing with denial of justice in the narrow sense of shortcomings, active or passive, by the judicial department; for courts, in addition to having the wish to do justice, are composed of scientific persons to whom justice is a profession, and hence when question is made as to the action of courts there is a peculiarly strong presumption that in every instance, whether a foreigner is concerned or not, justice is done.

Yet it is necessary to digress for a moment in order to answer the inquiry whether there are not several sorts of judicial or *quasi*-judicial tribunals as to whose acts towards aliens there is a well-recognized suspicion of the possibility of unfairness, a suspicion so common that interposition by the country of citizenship is frequently sought and not seldom given. There are indeed such tribunals. Thus the decisions of courts of claims have not been deemed sacred; and the reason is obviously that such tribunals are merely instrumentalities through which a government, without any necessity of yielding obedience or even of recognizing a consistent principle, passes upon the question of its own moral responsibilities. Careful and conscientious as are the courts of claims of some countries, it

must be conceded as a matter of practice that from the point of view of international law these decisions are less weighty than those of courts dealing with disputes between individuals. Nor do the decisions of those administrative courts which in some countries deal with the acts of executive officials receive great respect when an alien is a party in interest; for such courts, though enforcing the duties of officials towards private individuals, are in reality administrative commissions organized for the purpose of securing proper performance of official duties toward the government as well, and hence they are subject to the suspicion of being dominated by the executive department. Further, though in countries using the Anglo-American system of law public officials are exclusively amenable not to administrative courts, but to courts of the ordinary sort, there is inevitably an impression that here also there is in such cases a tribunal with a twist. Thus it happens that claims based on the misconduct of the government itself or of its officials, whether passed upon by courts of claims or by administrative courts or by courts of the ordinary sort, do not receive in international law precisely the same treatment as claims based on the denial of justice in the course of ordinary litigation. Again, the same is true of courts-martial, these being really commissions of the executive department performing some of its military functions. Finally, the decisions of courts of prize are also regarded with suspicion,[13] and deemed a not inappropriate place for interposition by an alien's home government and even for revision by a permanent court with international jurisdiction. The interest of the country to which the prize court belongs is so obvious that this last instance, like the others which have been mentioned, can hardly be called an exception to the general rule that to-day judicial decisions, even though unfavorable to aliens, receive high respect and should almost conclusively be presumed to be fair.

The rapid survey which has been taken of denial of justice in the wider of the two meanings of the phrase has resulted, it is trusted, in indicating the mode in which denial of justice in the narrower meaning, that is to say, denial of justice by the judicial department,

[13] Holzendorf, *Éléments de Droit International Public*, Sec. 78; 2 Oppenheim's International Law, Secs. 437–438.

should be treated; and now an attempt will be made to phrase the general doctrines derivable from the treatment heretofore accorded to such cases by diplomatic agencies and particularly by the State Department of the United States. The doctrines, it will be found, aim to secure justice, and aim to secure it through dignified diplomatic interposition in a fashion which will not provoke international jealousies by appearing to emphasize differences in national power or to claim for aliens greater privileges than are reasonably to be enjoyed by citizens. The day is past when any nation can insist upon the establishing of courts of peculiar constitution for aliens. Nor can any nation insist that its own favorite procedure — trial by jury, for instance — shall be the right of its citizens throughout the world. No, the practice of diplomacy in this matter is temperate in both form and substance.

It happens that instances of denial of justice in the narrower sense are not numerous and are usually intermingled with instances of denial of justice in the wider sense, and also that the practice has varied from time to time even in cases with similar circumstances.[14] Nevertheless, it is safe to say that when citizens resident abroad suffer denial of justice in cases that come, or that ought to come, before courts, good practice is as follows:

I. The alien, whether as plaintiff or as defendant, is entitled to as favorable treatment as is given to a resident citizen.[15]

II. The alien is entitled to no more enlightened procedure than is accorded to the citizen, unless that procedure is so cruel or unjust as to lose the right to be termed judicial.[16]

III. The alien must usually carry the case through the proper courts, both original and appellate.[17]

[14] Instances are collected in 3 Moore's International Arbitrations, 3073–3234, and 6 Moore's Digest of International Law, 651–1037, and Foster's Practice of Diplomacy, Chap. XVIII.

[15] Mr. Fish, Secretary of State, quoted in 6 Moore's Digest of International Law, 698.

[16] Mr. Forsyth, Secretary of State, quoted in 6 Moore's Digest of International Law, 652–653.

[17] Mr. Jefferson, Secretary of State, quoted in 6 Moore's Digest of International Law, 651–652; Mr. Clay, Secretary of State, quoted *ibid*, 652; Mr. Hay, Secretary of State, quoted *ibid*. 672–674 and 675–676.

IV. The alien need not carry the case through the courts if the courts are closed to him or if resort to them would be obviously useless.[18]

V. After the courts have been resorted to as far as is appropriate, the alien should complain to the executive department of the country of his residence.

VI. The complainant should next, or simultaneously, submit a memorial to the executive department of the country of his citizenship, stating the case and praying interposition.

VII. The interposition is made by executive department to executive department through diplomatic channels.

VIII. If the interposition leads to no satisfaction, there may be, of course, recourse to any one of the measures for settling international differences; but at the present time the most appropriate mode available is arbitration.[19]

IX. The result, in case the alien proves his claim, must be satisfaction from executive department to executive department, the satisfaction eventually reaching the alien himself in the form of an indemnity.

So much for the doctrines as they actually exist. In the future, whenever cases of denial of justice through the shortcomings of courts are sent to an international tribunal, it is to be hoped that they will be sent to a tribunal of a judicial as distinguished from a merely arbitral nature, for these cases are peculiarly appropriate to be dealt with by scientific persons, should lead not to compromise, but to exact justice, and should ripen into useful precedents for the guidance of all countries and of the tribunal itself.

The normal steps then, combining present practice with future probable development, should be litigation in and through the original and appellate courts of the country of residence, a complaint to the executive department of that country, a memorial to the executive department of the country of citizenship, interposition by that

[18] Lord Palmerston, addressing the House of Commons on the case of Don Pacifico, quoted in 6 Moore's Digest of International Law, 681–682.

[19] Formerly the standard procedure was to grant to the injured person letters of marque and reprisal. See Grotius, *De Jure Belli ac Pacis*, III, 2, 4 *et seq.*, 3 Moore's International Arbitrations, 3162.

country, a proceeding in an international tribunal of a judicial nature, and satisfaction by the executive department of the country of residence, acting through the executive department of the country of citizenship.

In passing, it should be noticed that in one respect a proceeding in an international judicial tribunal will almost necessarily differ from an ordinary proceeding of an appellate nature, as what will be obtained will naturally be not a reversal of the judgment below, but simply a decision which will result in the giving of satisfaction by the government responsible for that defective judgment. To be sure, any nation which sees fit may adopt as part of its judicial system a provision that a judgment to which an alien is a party in interest shall be conditional upon possible action by an international tribunal; but save in prize cases such a provision is extremely impossible, and with the same exception it is distinctly undesirable, for the reason, among others, that to the nation and to aliens also little but harm can come from an impression that aliens belong to a favored class and are above the ordinary law.

Yet though even in international tribunals of a judicial nature proceedings as to denial of justice must thus differ from proceedings under writs of error from the Supreme Court of the United States to the State courts, nevertheless, throughout the discussion as to denial of justice to resident aliens, the lawyer is necessarily reminded of several features of the United States Constitution — the jurisdiction given to the federal courts in cases where there is danger of injustice by reason of the parties being citizens of different States, and the provisions of the Fourteenth Amentment that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The justice which the Constitution of the United States attempts to secure for all persons within the national boundaries distinctly resembles the justice which every nation wishes to secure for its citizens everywhere.

The necessity for doctrines as to denial of justice arises, of course, wholly from the fear that prejudices based on differences in race or in country may lead to unfairness in practical matters. Does any

one really doubt the reasonableness of that fear? Surely not, although one may well insist that such prejudices are less dangerous than they once were. In 1760 a testator who was chief justice of the Vice Admiralty Court of the Colony of New York, and who lived not more than twenty miles from the sister Colony of Connecticut, left a will containing this passage:

> It is my desire that my son, Gouverneur Morris, may have the best education that is to be had in England or America, but my express will and directions are that he be never sent for that purpose to the Colony of Connecticut, lest he should imbibe in his youth that low craft and cunning so incident to the people of that country, which is so interwoven in their constitutions that all their art cannot disguise it from the world, though many of them, under the sanctified garb of Religion, have endeavored to impose themselves on the world for honest men.[20]

What wealth the testator left to that son I do not know; but I perceive that to you and me the testator inadvertently left a valuable mile-stone wherefrom we can measure a great part of the progress which in the intervening one hundred and fifty years mankind has made in charity and wisdom. Yet until the millenium comes prejudices like those frankly expressed by that New York judge must emerge now and then, and hence it happens that this topic of the denial of justice continues to have practical importance.

The conclusions to which this discussion leads are:

First, that by reason of constant advances in judicial machinery and in international good will the place which denial of justice in the courts occupies in the much larger subject of protection to citizens residing abroad is a place of diminishing area;

Secondly, that this topic, by reason of the simplicity of the propositions, to which it can be reduced, is peculiarly capable of being codified;

Thirdly, that by reason of the similarity which the questions of law and of fact involved in disputes as to denial of justice in the courts bear to the questions adjudicated in ordinary national tri-

[20] Yale Alumni Weekly, Vol. 13, p. 337; Jared Sparks' Life of Gouverneur Morris, Vol. I, p. 4, note.

bunals, there is here a peculiarly appropriate occasion for resorting ultimately to international tribunals of a judicial as distinguished from an arbitral or diplomatic nature;

Fourthly, that thus it happens that this narrow topic, almost because of its very narrowness, becomes of peculiar importance as naturally leading to the adoption through international agreement of machinery — namely, codification and courts — whereby ultimately matters of much greater delicacy and practical importance may be so dealt with as to promote justice, international understanding, and peace.

The CHAIRMAN. This topic will be continued by Mr. Walter S. Penfield.

ADDRESS OF MR. WALTER S. PENFIELD, OF WASHINGTON, D. C.,

ON

The Place of Denial of Justice in the Matter of Protection.

In discussing the question of the place of denial of justice in the matter of protection, the subject logically resolves itself into, first, the duty of a nation to extend protection when there is a denial of justice to those of its subjects residing under the sovereignty of a foreign state; and, second, the basic elements constituting a denial of justice for which international intervention may be exercised.

I. THE DUTY OF A NATION TO EXTEND PROTECTION TO ITS CITIZENS.

Vattel says that whoever uses a citizen ill, indirectly offends the state, which is bound to protect the citizen, and should, if possible, oblige the aggressor to make full reparation.[1] And Pradier-Fodéré says that it is the duty of every state to protect its citizens abroad, and that it owes them this protection when the foreign state has proceeded against them in violation of principles of international law.[2]

When its citizens go abroad, a state claims the right to protect

[1] Vattel, Law of Nations, Ch. VI, Sec. 71.

[2] Pradier-Fodéré, Traite de Droit International Public, I, Secs. 329–354.

them, notwithstanding they fall at once under the territorial supremacy of a foreign state. This right is usually exercised when a wrong has been committed which the foreign state refuses to remedy.[3]

Although the acts of a sovereign, which are not conformable to international law, may be binding upon his own subjects, it does not follow that they are binding upon the subjects of other states. Their government has the right to demand redress for the unjust act "whether it proceed from the direct agency of the sovereign himself, or is inflicted by the instrumentality of his tribunals."[4]

Where there has been a denial of justice to an alien, his home government is justified in holding the foreign government responsible, for, under the law of nations, a

government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor.[5]

It may, therefore, be said that protection should be granted by states to their citizens, when they have been maltreated by the administrative officers of a foreign state, provided proper legal redress either can not be obtained through local courts, or the means of obtaining such redress has been exhausted in vain; and that as between their subjects and other individuals, states should insist that the protection of such foreign state and the justice of its courts should be extended equally to their subjects, if said courts are guilty of serious acts of injustice.[6]

II. DENIAL OF JUSTICE.

"Justice," says Vattel, "is the basis of all society."[7] Calvo defines justice as "rendering to each one his due, respecting the rights of another, while also conforming our own actions to the

[3] Oppenheim, Int. Law, I, p. 374.
[4] Moore, Int. Law Dig., VI, p. 697, with citations.
[5] *Ibid*, p. 655, with citations.
[6] Hall, Int. Law, 5th ed., p. 278.
[7] Vattel, Law of Nations, Ch. V, Sec. 63.

law;" [8] and he defines a denial of justice as "every refusal to give any one his due." [9]

Sir Travers Twiss says that

International justice may be denied (1) by the refusal of the nation either to entertain the complaint at all or to allow the right to be established before its tribunal; (2) or by studied delays and impediments, for which no good reason can be given, and which are in effect equivalent to a refusal; or (3) by an evidently unjust and partial decision.[10]

While it is true that those who resort to foreign countries are bound to submit to their laws, the exception to this rule is that when palpable injusice, that is to say, such as would be obvious to all the world, is committed by that authority towards a foreigner, for alleged infractions of municipal law, of treaties, or of the law of nations, the government of the country whereof the foreigner is a citizen or subject has a clear right to hold the country whose authorities have been guilty of the wrong accountable therefor.[11]

The right of intervention when there is a denial of justice is a question for the determination of the diplomatic forum of a government.

As an individual seeking protection is a member of the society of which the state is composed, every state may exercise the right of intervention when such individual is wronged in his person or property, or it may at its discretion decline to do so for state reasons.[12]

It is thus for the diplomatic forum of a government to determine whether it will take diplomatic jurisdiction or whether it will decline to do so on the ground that the claimant had or had not adequate remedies, and had or had not fairly tried and exhausted them; or whether those remedies were real or illusory; and so determine

[8] Calvo, Dictionnaire de Droit International, p. 418. This definition was evidently taken from *The Institutes of Justinian*, who, in turn, quotes from *Ulpian's Rules*. See Abdy & Walker Inst. Just., p. 1.

[9] *Ibid*, p. 237.

[10] Twiss, Law of Nations, Part 1, p. 36.

[11] Wharton, Int. Law Dig., II, p. 613, with citations.

[12] Oppenheim, Int. Law, I, p. 375.

whether a government has a right under international law to hear the appeal, take jurisdiction and intervene. The right of diplomatic intervention in cases of a denial of justice, is one of the high prerogatives of sovereignty; a right which in the nature of things must rest in the discretion of every sovereign; and every respecting government will decide for itself the question of its discretionary right to intervene in any given case. It would thus be politically impossible to submit to judicial review the exercise of diplomatic discretion to intervene in such cases because it would defeat the supreme object of intervention by paralyzing the protecting arm of the sovereign.

The exhaustion of local remedies in cases involving denial of justice.

The state should interfere in behalf of its citizens when the laws of a foreign state are oppressive *per se,* when they are unjustly administered, or when they make possible the commission of wrongs, without providing a remedy. When the government having itself committed a wrong, has such control over the courts as to ensure a denial of justice to the foreigner, or where its act is of a flagrant character, a state is justified in taking such steps as may be proper to secure immediate protection to its citizens.[13] But where there is a competent judiciary, in which the procedure is fair, and to which the same access is given to foreigners as is given to subjects, then the complaint for pecuniary redress must be made to such judiciary.[14]

It is a well-settled principle of international law that where a citizen of one state deems himself wronged by the action of another state's court to which he is admitted to equal privileges, he can not call upon his own government for diplomatic intervention until he has exhausted all means of redress, by appeal or otherwise, in the courts of the state complained of, and then he can only invoke the aid of his government in case of a manifest denial or failure of justice.[15]

[13] Hall, Int. Law, 5th ed., p. 279.
[14] Moore, Dig., VI, p. 699.
[15] *Ibid*, p. 669, with citations.

In his opinion in *The Tax Seizure* case, in the claim of John D. Metzger and Company *v.* Hayti, Judge William R. Day, as arbitrator, in discussing the right of a state to intervene before the claimant has exhausted his local remedies, held:

As a general proposition it is settled international law that a government will not intervene in claims against foreign governments when redress may be had in the courts of that country. If there has been a substantial denial of justice or a gross miscarriage thereof sanctioned and approved by the opposing government, a nation will then intervene.[16]

It was contended by the United States in the case of the *Rebecca* that

in view of the fact that the prior proceedings had been so palpably arbitrary and unjust, the master and owner were not bound to attempt further judicial remedies in the local tribunals.[17]

And Secretary of State Hamilton Fish held in another case:

Justice may as much be denied when, as in this case, it would be absurd to seek it by judicial process, as if it were denied after having been so sought.[18]

Lord Palmerston in a speech in the House of Commons said:

There may be cases in which no confidence can be placed in the tribunals, those tribunals being, from their composition and nature, not of a character to inspire any hope of obtaining justice from them. It has been said, "We do not apply this rule (the exhaustion of local remedies) to countries whose governments are arbitrary or despotic, because there the tribunals are under the control of the government, and justice can not be had; and, moreover, it is not meant to be applied to nominally constitutional governments, where the tribunals are corrupt."

Lord Palmerston then states that the broad doctrine is, that, in the first instance, redress should be sought from the law courts of

[16] Foreign Relations of the U. S., 1901, p. 275.
[17] Moore, Dig., VI, p. 667, with citations.
[18] Wharton, Dig., p. 618, with citations.

the country; but that in cases where redress can not be so had, to confine a British subject to that remedy only, would be to deprive him of the protection which he is entitled to receive.[19]

It would seem, then, that it may safely be said that it is not necessary to exhaust local remedies in a foreign state where justice is absolutely wanting.[20] Nor is it necessary, where the offending government in its diplomatic negotiation with the government whose citizen has been injured makes statements or acts in such a way with reference to the injury as to relieve the party from seeking redress in the courts.[21]

Intervention for denial of justice in contractual cases.

While the United States most frequently intervenes in cases of wrong and injury to person and property, such as the common law denominates torts and regards as inflicted by force and not the results of voluntary engagements or contracts,[22] it will also support the contractual claims of its citizens against foreign powers, when the citizens holding such claims are denied a judicial remedy against it.[23]

Secretary of State Lewis Cass said that under ordinary circumstances when citizens of the United States go to a foreign country they go with an implied understanding that they are to submit themselves in good faith to its established tribunals. The case, however, is different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time and labor and capital from a reliance upon its own good faith and justice.[24]

International commissions have frequently allowed claims based

[19] Moore, Dig., p. 681, with citations.
[20] *Ibid*, p. 677, with citations.
[21] *Ibid*, p. 682, citing 13 Op. Atty.-Gen., 547.
[22] Wharton, Dig., II, p. 656, with citations.
[23] For. Rel., 1888, Part I, p. 136.
[24] Mr. Cass, Secretary of State, to Mr. Webb, December 7, 1867. MSS. Inst. Brazil, cited by Wharton, Dig., II, p. 615.

on the infraction of rights derived from contracts where the denial of justice was properly established.[25]

A plan sometimes adopted to defeat the right of a government to protect its nationals is to stipulate, in a franchise or concession, that diplomatic intervention shall not be resorted to in case of differences arising between the government and the concessionaire in respect of the contract, and a clause is inserted in the contract providing for the method of local arbitration in case a dispute may arise. A consideration for the agreement to renounce diplomatic intervention is the agreement to arbitrate. When this agreement is set aside and annulled by the arbitrary or unlawful act of an executive, he generally pleads as against diplomatic intervention that the concession provides redress in the shape of arbitration. But the government having violated the agreement can not rightfully or legally appeal to that same agreement in support of its own wrong. It is because of such action constituting a denial of justice that the government of the national is justified in extending diplomatic intervention.

When questions arise as to whether such a contract is being faithfully executed, a declaration of forfeiture should not possess any binding force unless pronounced in conformity with the provisions of the contract, if there are any; or if there is no provision for that purpose, then unless there has been a fair and impartial investigation in such a manner as to satisfy the government that the proceeding has been just and that the decision ought to be submitted to.[26]

We find that national liability for denial of justice existed in the *El Triunfo* case, because the decrees of the president and the acts of the bankruptcy court were illegal under the laws of the state and therefore illegal under the law of nations. These were avowed and upheld by the government, which made possible an undue discrimination of justice, for which only illusory remedies were afforded.[27]

[25] Moore, Dig., VI, 718, referring to Moore, Int. Arb., IV, 3425–3590; Lawrence's Wheaton (1863), 510; Phillimore, 3d ed., II, 8; and Rivier, Principles du Droit des Gens, I, 272.

[26] Mr. Cass, Secretary of State, to Mr. Lamar, July 25, 1858, MSS. Inst. Am. St., cited by Wharton, II, p. 661.

[27] Report of William L. Penfield, Solicitor for Dept. of State, to John Hay, Secretary of State, 1901, in Salvador Commercial Company case.

Although a person holding a concession agrees by its terms to refer all doubts to the local courts, whose decision shall be final and binding, and shall not be the subject of an international claim, the claimant's country has the right to intervene in case of denial of justice or undue delay in its administration.[28]

Denial of justice by the coordinate branches of a government.

A state is responsible for the acts of its rulers, whether they belong to the executive, legislative, or judicial department of the government, so far as the acts are done in their official capacity.[29]

There would be a judicial denial of justice, affording grounds for diplomatic intervention, when a court needlessly delays in the trial of a citizen;[30] when it closes to an alien litigant some given channel of recourse which is open to a native and does not leave open some equivalent recourse;[31] when an alien has obtained a money judgment against the country in which he is residing and the same remains unsatisfied for an unreasonable length of time;[32] or when a foreign judge renders a fraudulent judgment against an alien citizen.[33]

But a government can not be held responsible for the mistakes of its courts, and certainly should not be when the party complaining has not exhausted all the means within his reach of correcting the errors that may have been committed.[34] Nor is it responsible to a foreign government for an alleged erroneous judicial decision rendered to the prejudice of a subject of said foreign government, unless the subject having made a full and *bona fide* defense, has carried his case to the court of last resort without obtaining justice. Then only could his home government properly intervene.[35]

A foreigner is subject to the criminal as well as the civil laws of the country within which he resides, and his government could not

[28] Woodruff Case, Ralston's Report, p. 151.
[29] Halleck, Int. Law, I, p. 442.
[30] Wharton, Dig., II, p. 637, with citation.
[31] For. Rel., 1885, p. 517.
[32] For. Rel., 1904, p. 678.
[33] Wharton, Dig., II, p. 615, with citations.
[34] Moore, Dig., VI, p. 659, with citation.
[35] *Ibid*, p. 652, with citations.

make proceedings against him a ground of complaint, unless the laws are contrary to treaty stipulations, or are used in bad faith or oppressively to inflict injuries upon him.[36] All that can be asked of a foreign government, or that can be demanded as a right, is, that in her proceedings against the citizens of the interposing country, who are being prosecuted for offenses committed within her jurisdiction, it should give them the full and fair benefit of its system, such as it is, and deal with them as it does with its own subjects or those of other foreign powers.[37]

Phillimore says:

> A plain violation of the substance of national justice, for example, refusing to hear the party or to allow him to call witnesses, would amount to the same thing as an absolute denial of justice.[38]

Accused persons should be apprised of the specific offense with which they are charged; should be confronted with the witnesses against them; have the right to be heard in their own defense, either by themselves or counsel; in short, they should have a fair and impartial trial.[39]

And where there is unjust discrimination subjecting the citizen to peculiarly harsh imprisonment, or other injuries,[40] or where he is unlawfully imprisoned by military authorities, the local courts refusing to grant protection, there would be judicial denial of justice forming the basis of a claim for damages against the government of such foreign state.[41]

The right to protect subjects abroad gives to a government the means of guarding them against the effect of unreasonable laws, of laws totally out of harmony with the nature or degree of civilization by which a foreign power affects to be characterized.[42] For legislatures have passed laws so unjust and unreasonable in their reading

[36] Wharton, Dig., II, p. 614, with citation.
[37] *Ibid*, p. 614, with citation.
[38] Phillimore, Commentaries upon Int. Law, II, p. 5.
[39] Wharton, Dig., II, p. 623, with citation.
[40] *Ibid*, p. 618, with citation.
[41] Ralston's Report, p. 764. Case of Tagliaferro.
[42] Hall, Treatise on the Foreign Powers and the Jurisdiction of the British Crown, Sec. 5.

as to convince even the mind of a layman that they were framed for the sole purpose of evading national responsibility in cases of denial of justice.

The congress of a sister republic enacted a law that every foreigner was obliged to obey the laws and authorities of the republic, and to obey the decisions and sentences of the tribunals, without other recourse than those given by these same laws to its own citizens.[43] The object of that provision was, of course, to cut off the right of intervention, even though there should be a flagrant denial of justice by a court of last resort. Since their citizens had no recourse to a foreign government for protection in such a case, under this law foreigners were denied such recourse to the protection of their own government.

The same congress expressly enacted a law in relation to foreigners for the evident purpose of defining clearly the meaning of the term "denial of justice." The law reads as follows:

> There is a denial of justice only when the court shall refuse to make a formal decision on the principal matter in dispute or on any incidents of the case. The mere fact that the judge has rendered a decree or sentence, of whatever nature, does not give the right of appeal as for a denial of justice even though the decision is iniquitous and given against express law.[44]

It is quite evident that the despotic maxim — *the will of the prince is law* — was thus clothed in the extraordinary form of a legislative precept, that the ignorance, the caprice, the prejudice or the malice of any petty judge was justice to the foreigner. According to this law, judgment against express law was justice, and malice or hatred was justice, if meted out by the judge to the foreigner, provided it was embodied in a formal decision. Thus it can be seen that, under this statute, judicial injustice to foreigners was legislatively declared to be impossible.

The congress of another country enacted a statute which provided, among other things:

That neither natives nor foreigners shall have any right of in-

[43] Ley de Extranjeria del Salvador, 1886, 4th ed., Ch. IV, Art. 38.
[44] *Ibid*, Art. 40.

demnity for losses or damages caused by the government in its military operations or in the measures it may adopt in the restoration of public order;

That the nation is not responsible for losses or damages consequent upon measures adopted by the government toward natives or foreigners for their arrest whenever the exigencies of public order require such action.

It also provided that "indemnities not prohibited as aforesaid, could only be made in conformity with the law of public credit and upon a previous judgment by a competent judicial officer."

The effect of this law, if carried to successful execution, would be to deny to aliens the protection of their own government against arrests, imprisonments, and confiscations in many aggravated cases, and in others to defeat their substantial claims to the reduction of their damages or the delays studied by judges appointed and dominated by the chief upon whose authority and in whose behalf the wrongs were done.

With respect to this statute the State Department held that it was "subversive of all the principles of international law;" that the country thereby placed "herself outside the pale of international intercourse;" and that the United States could never acquiesce in any attempt on the part of the government to use such a statute as an answer to a claim which this government has presented.[45]

The rule requiring the exhaustion of all judicial remedies in pursuit of justice would have no reason or application in cases arising under these laws, for it would be useless to seek justice.

A denial of justice may be made possible and result from the promulgation by an executive of a discriminatory and inequitable decree. The president of another country issued a decree prescribing the mode of presenting claims whether of natives or foreigners, and providing that if the claimant exaggerated the injuries suffered by him he should forfeit his claim and incur a heavy fine or imprisonment. The effect would be, of course, to deter claimants from the prosecution of their claims on account of the hazards contingent on their prosecution. Secretary of State Hamilton Fish let it be

[45] For. Rel. U. S., 1888, Part 1, pp. 490–1, Laws of Ecuador, 1888.

understood that the Government of the United States would not consent to the enforcement of such laws against its citizens.[46]

Conclusion.

It is thus seen that there may be a denial of justice in both civil and criminal causes, in cases arising *ex contractu* as well as *ex delicto,* and that such denial may arise and be made possible by virtue of unreasonable legislative enactments or the promulgation of unjust executive decrees.

But cases may arise in which one is not quite sure that there has been a denial of justice justifying diplomatic intervention. Especially is this true when relief has not been sought in local courts. Under such conditions when redress has been denied by a foreign government, the propriety of the action of the state of the injured individual either toward the foreign state in support of the claim of its citizen or in refusing to take diplomatic action in support of the claim, must depend on the particular facts of each case.[47] And the merits of the individual case and the judgment of the state concerned will determine in just what way and just how far the right of protection ought to be exercised.

(At 11:30 o'clock a. m. the Society adjourned until 2:30 o'clock p. m. of the same day.)

AFTERNOON SESSION.

(Saturday, April 30, 1910.)

The Society met at 2:30 o'clock p. m., pursuant to adjournment. In the absence of the president and a vice-president, Prof. Geo. G. Wilson, of Brown University, a member of the Executive Council, took the chair.

The CHAIRMAN. The subject for discussion before the Society this afternoon is *Intervention for breach of contract or tort where the contract is broken by the state or the tort committed by the government or governmental agency.* Mr. R. Floyd Clarke is the first speaker on this subject.

[46] Decree of President Guzman Blanco of Venezuela, 1873.

[47] Hall, Int. Law, 5th ed., p. 279.

ADDRESS OF MR. R. FLOYD CLARKE, OF NEW YORK CITY,

ON

Intervention for Breach of Contract or Tort Committed by a Sovereignty.

The implied term in this title is, that a citizen of another sovereignty has been affected by the wrongful act. At the outset a clear line of demarcation must be drawn between tort and contract claims. From the earliest times crimes or torts perpetrated upon the citizens of one country by the government of another have been the main causes of friction between nations, leading in many instances to redress, in some to war. The right of a sovereignty to redress such grievances has been recognized by all. The manner of enforcement of such claims, whether by unofficial presentation, good offices, intervention, or war, is in the discretion of the offended nation.

Not so, however, has it been, heretofore, so far as concerns contract claims. Our original American doctrine on the subject (based partly on Hamilton's early *dictum*) drew a distinction between tort and contract. Mr. Buchanan, Secretary of State, writing in 1848, said:

> In the case of violation of contract, the rule has been not to interfere, unless under very peculiar circumstances, and then only to instruct our diplomatic agents abroad to use their good offices, * * *

Great Britain adopted a contrary policy. In the debate in Parliament in 1847 as to the nonpayment of about $230,000,000 of interest due on Spanish bonds held by British citizens, Lord Bentinck advocated war as the proper mode of pressing the claim. Lord Palmerston in reply admitted the right of the British Government to wage war against Spain for the recovery of this debt, but denied its expediency under the existing circumstances. He was, however, prompt to add: "But this is a question of expediency, and not a question of power," and warned foreign countries against stretching too far the patience of the British nation.[1]

[1] 6 Moore, Dig. Int. Law, 286.

The same rule was expressed in Lord Palmerston's circular of 1848,[2] and was reiterated by Lord John Russell in 1861.[3]

France and England joined in the sixties in using force to obtain redress on the claims of their citizen bondholders against Mexico.

In 1902 Mr. Balfour, Prime Minister of England, in the debate on Venezuelan matters, said:

> I do not deny, in fact I freely admit, that bondholders may occupy an international position which may require international action.[4]

Thereupon, in December, 1902, England, Germany, and Italy sealed their approval of the doctrine of force by opening a bombardment on the Venezuelan coast and enforcing a blockade.

To this consensus of opinion and practice of the greater nations has been opposed the strong protest of all the nations of Latin-America.

Likewise, the publicists are at issue on this question. Hall, Phillimore, and Rivier assert the right to use force. Calvo, Pradier-Fodéré, Rolin-Jaequemyns, F. de Martens, Despagnet, Kebedgy, and Nys assert the contrary rule.[5] Hall states the better rule with precision when he says:

> Fundamentally, however, there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrongdoer, is immediately responsible. The difference which is made in practice is in no sense obligatory, and it is open to the governments to consider each case by itself, and to act as seems well to them on the merits.[6]

[2] Lord Palmerston there stated that the question of whether his government should make the matter of nonpayment of foreign bonds a subject of international negotiation was entirely a matter of discretion and not a question of international right. 1 Scott's Hague Peace Conferences, 402.

[3] Lord John Russell, in 1861, wrote: "It has not been the custom of Her Majesty's government, although they have always held themselves free to do so, to interfere authoritatively on behalf of those who have chosen to lend their money to foreign governments." 1 Scott's Hague Peace Conferences, 402.

[4] 1 Scott's Hague Peace Conferences, 402.

[5] Hershey, Article on Calvo and Drago Doctrines, 1 Am. Journal of Int. Law, 37.

[6] Int. Law, 5th ed., 281.

For numerous precedents where governments have enforced contract claims by good offices and arbitration see note.[7]

[7] Article 6 of the Jay Treaty between the United States and Great Britain, 1 Moore Int. Arb. 271; under the Florida Treaty between United States and Spain, 5 Moore Int. Arb. 4504; United States and Chilean Commission, 1892, 4 Moore Int. Arb. 3569; the Venezuelan Bond Cases, 4 Moore Int. Arb. 3616, 3631, 3651; Garrison Case, *ibid*, 3554; the Hammaker Case *v.* Mexico, 4 Moore Int. Arb. 3470; the Idler Case *v.* Venezuela, 4 Moore Int. Arb. 3491; the Central and South American Telegraph Company *v.* Chile, United States & Chilean Arbitrations, 1901, p. 205. For further cases of contract claims, without tortious elements, presented and enforced to the point of arbitration before an international tribunal, see 4 Moore Int. Arb. at the following pages: Herman case, p. 3425, supplies to a war vessel; Hunter case, p. 3426, war supplies; Eckford's case, p. 3429, for building of man-of-war; William S. Parrott case, p. 3429, claim on a bill of exchange against Mexico; Meade's case, p. 3430, delivering to Mexico vessels of war; Zander case, p. 3432, for supplies, which, though unsuccessful, was yet presented and was merely a contract; Underhill's case, p. 3433, for a charter of a vessel to the government; Ulrick's case, p. 3434, for lease of a house for a legation; Union Land Company case, p. 3434, on colonization contracts; there were claims against Mexico for depreciation of scrip arising out of the Texas Revolution, etc., p. 3445; Mary Smith case, p. 3456, an order for $211, not allowed, but presented; Hayes' case, p. 3457, on contract, not allowed, but presented; Rowland's case, p. 3458, for customs receipts, not allowed, but presented; Eldredge's case, p. 3460, for loans and supplies to the government; the Manasse & Company case, p. 3462, supplies of war; the Itarria case, p. 3464, supplies to troops; Newton's case, p. 3465, the amount unpaid on custom house drafts was allowed; Steelman's case, p. 3465, sale of arms to the government; DeWitt case, p. 3466, the Hammaker case, p. 3470, the Idler case, p. 3491, recovery for military supplies; cases of Donnell's Executor and Hollins & McBlair, pp. 2545, 3547, for supplies, sale of provisions; case of Beales, Nobles & Garrison, p. 3548, on an immigration contract; case of Flannagan, Bradley, Clark & Co., p. 3564, Walter's case, p. 3567, customs dues due for building mole and breakwater; Trumbull's case, p. 3569, claim for services as counsel for a diplomatic agent; Hodgkins case and Landreau claims, pp. 3571, 3584, based on discovery in Peru of certain guano deposits and claim against the government in consequence.

Likewise all the cases in which the different governments of the world have pressed the claims of bondholders against foreign governments, even to the extent of intervention and war, are clear precedents that claims for breaches of contract, where gross injustice is apparent, will be insisted upon even in the absence of tortious element of seizure of property.

Among historic instances is the case of the intervention of France and England in Mexico for the protection of Mexican bondholders.

So the intervention of Germany, England, and Italy by bombardment and blockade of Venezuelan ports in 1903 was on behalf of claimants holding merely contractual, as well as other, claims.

Precedents to the contrary may also be found.[8] These consist chiefly of decisions of arbitrators dismissing contract claims on the ground that because they are claims for mere breach of contract they could not be considered on their merits in an international arbitration. The reasons given for this result are either, that they are not covered by the terms of the protocol, that they are not covered by international law, that they can not be enforced because no recourse has been had to the courts of the country, or that the existence of the Calvo clause bars their consideration or compels an adverse decision.

So far as concerns all except the first ground, which is a mere question of verbal interpretation, these decisions are now of little weight. The better view is now seen to be that all these preliminary questions as to whether a claim should be enforced, etc., are in the nature of pleas in abatement which are waived by the consent to arbitrate. They constitute considerations of public policy proper enough to be weighed by the government to whom the claim is presented, but when that government, in spite of their existence, has forced by diplomatic pressure the claim to an arbitration, it is contrary to all ideas of justice that a decision on such arbitration should be made on any other basis than a basis of absolute equity on the merits of the claim.

Arbitration of these matters is a new development of modern international law. It is not surprising, therefore, that in the early cases some arbitral commissioners, consulting authorities stating the principles of policy to be applied by governments to whom the claim is presented, have been misled into thinking such rules of domestic policy merely laid down for ordinary guidance and subject to excep-

Other precedents of insistence upon mere bondholders' claims where of course there was no tortious element of seizure of property, but only the refusal to pay an obligation, are the cases mentioned in chapter 64 of Moore's International Arbitrations. 4 Moore Int. Arb. 3591–3664. See also 4 Moore Int. Arb., Ch. 63, pp. 3425–3490; the Venezuelan Bond cases, 4 Moore Int. Arb. 3616–3651; Garrison *v.* Venezuela, No. 38, U. S. & Venezuelan Claims Commission, 1885; Mayers *v.* Chile, U. S. & Chilean Claims Comm., 1901; Central & South Am. Telephone Co. *v.* Chile, *id.;* DeWitt *v.* Mexico, No. 431, U. S. & Mexico Claims Comm., 1868; Mulligan *v.* Peru, 2 Moore Int. Arb. 1643.

[8] See 4 Moore International Arbitrations, pp. 3467–3484.

tion on occasion, to be a part of the common law, so to speak, of international arbitration. Thus the rule of international law that local remedies must, as a rule, be exhausted,[9] is a rule of policy for the government to whom the application for redress is made. So, likewise, the Calvo clause existing in a concession whereby the concessionaire agrees to relinquish all right of applying to his own government for diplomatic reclamation and protection. Once that government has, on the admitted fact of no recourse to local courts or existence of Calvo clause, demanded and obtained an arbitration, only the merits of the claim as a claim in equity are before the arbitrators. For the essence of the conception of an arbitration, and especially an international arbitration, is that a decision shall be rendered on the merits and that no technicality shall stand in the way of absolute justice being done. Again, it is inconceivable that a government which has demanded arbitration under such conditions has agreed to a vain thing, namely, the defeat of the claim on which it has made the demand on a fact known and apparent at the time of the insistence on arbitration to the government so insisting. So likewise with the government consenting to the arbitration. It must, in view of the essence of the idea of arbitration, be conceived as consenting to a trial on the merits and to a waiver of such a plea in abatement, by the mere act of its consent to arbitrate.

Neglect to realize the application of these obvious fundamental truths as applying to such arbitrations has led to arbitral decisions which are a stench in the nostrils of our noble profession and which, in their unjust results, are sufficient to make the angels weep.

Under these conditions of lack of agreement of the publicists and the precedents on this question, it may be well to examine the reasons for and against the alleged rule of international law that force should not be used in the enforcement of contract debts.

In Secretary Root's well-weighed instructions to the American delegates to the Rio Conference in 1906, as adopted and expanded by the President for the purposes of the Second Hague Conference, may be found a clear appreciation of the rule, and its limitations, and the reasons for it. He says:

[9] 6 Moore Dig. Int. Law, Sec. 987.

It appears that modern public opinion is decidedly opposed to the collection by force of contractual debts * * * The view of the majority seems to be that the correct rule of international law is non-intervention, but that intervention is either legally or morally permissible in extreme cases.

He then goes on to state that the principle of non-intervention by force would be of incalculable benefit to all parties concerned. First, to the creditor nation in that it would be a warning to prevent its citizens from trading on the necessities of an embarrassed foreign government and then relying on their own government to make the bargain valuable, and further in that it would preserve friendly relations between the creditor nation and the debtor nation and prevent complications with neutrals. Second, the principle would relieve possibly strained relations with neutrals. Third, it would advantage the debtor state whose operations would thus be based solely on its own credit. The alternative of arbitration would appeal as a protection to the honest creditor.[10]

These reasons may be condensed to two general propositions, the horror and inexpediency of risking the evils of war in presenting and enforcing a claim for mere money damages on a breach of contract.

As a matter of balanced evils, what loss of money to private parties on a mere breach of a contract could be weighed in the balance against the crime on humanity which would be perpetrated were such a claim demanded and rejected to lead to war between two great civilized nations, such, for instance, as England and the United States, or the United States and Germany. The thought is almost unthinkable from the mere standpoint of expediency. And yet if there be such a thing as *Jus* in this best of all possible worlds — and the traditions of our profession lead us to assert its existence against all comers — the persistence of that conception and its survival in the course of our evolution has been predicated upon the discarding of the precepts of expediency when in conflict with the precepts of right. And if we are to advance in civilization and morality, this process must continue.

[10] 1 Scott's Hague Conferences, 403, 404.

Since, however, expediency here looms so large, a compromise must be effected, if possible. That compromise is arbitration by consent. And should the arbitration be refused, then since the party refusing assumes to act as judge in his own case to absolve from all liability, then to the end that *Jus* not otherwise to be obtained shall be at least vindicated, "cry havoc and let slip the dogs of war," a course logically defensible since otherwise no progress in the evolution of justice can be made and the thief and despoiler might flourish in the world to the shame of honest men.

Again, on principle and on fundamental reasons of justice and equity, no valid distinction can be drawn between the right or obligation of a government to intervene diplomatically in behalf of its citizen who has been despoiled of his property through a tortious act of a foreign government, and the right, or duty, of a government to intervene on behalf of its citizen who has been despoiled of his property by a gross breach of a mere contract on the part of a foreign government. If the distinction were alleged between the right of a government to intervene for damages arising out of personal injuries as distinguished from damages arising out of injuries to property, some reason for the difference might exist; but not in the case of a mere distinction between a property loss, whether the same results from a tort, or from a breach of contract.

The origin of the rule that a government would not intervene to protect mere contract rights is not far to seek. It will be found that such rule was originally laid down in connection with claims against foreign governments of equally high civilization and of equally high moral attributes as our own, where the presumption was that justice, if justice existed, could be obtained in the ordinary course from that government or its courts.

As between nations of equal military power, equally high civilization, and equally high ideals of justice, any other rule would probably lead to more public inconvenience and loss than could possibly be compensated for by the mere righting, or attempting to right, any particular wrong in any particular instance. For the embroiling of two great civilized nations, such as Great Britain and the United States, over a mere contract claim, into a war, would in itself be

such a great crime against civilization as to preclude the possibility of a resort to such means under such circumstances. Nor, as a matter of practice, in even a tort case would the governments of those great nations be likely to carry their international intervention process to that extent. For even in the great historical instance of the Alabama claims it is not likely that their absolute rejection by Great Britain would actually have led to a war between the countries.

As a matter of fact during the last century, the insistence upon such contract and tort claims between the great nations has led to arbitration and not to war.

The debate as to whether war is a proper mode of enforcing redress on contract claims has only arisen, as a practical question, between the great nations and certain Latin-American countries. These latter asserting their favorite doctrines of Calvo and of Drago to be sacrosanct principles of international law, claim thereunder an immunity bath from all international reclamation regardless of the injustice, if any, perpetrated. Latterly these claims have been treated with scant courtesy. The practice of the great nations, England and Germany, for instance, has been, first to request arbitration, and, on its refusal, to hold these governments to their strict obligations, even to the extent of forcing them to do justice at the cannon's mouth. Witness the blockade and bombardment of Venezuela by the allied Powers in 1902.

It is difficult to see why, under international law, it should be held that intervention (with all its threat of war, etc.) is proper to obtain damages for a seizure of a few barrels of flour, or a coasting schooner worth a few thousand dollars, and at the same time such intervention is improper to obtain damages for hundreds of thousands of dollars invested in a plant valuable only in connection with a concession granted by the foreign country and which, through the revocation of the franchise, has become valueless. The property right infringed is as much property in the one case as in the other. If the question arose under municipal law it could receive but one answer, namely, that if intervention is proper in one case, it is proper in the other.

And here we may call attention to the apparent trend of the evolution of international law along the same lines of development which have taken place in municipal law. For, as shown by the precedents stated above, the bar of the alleged rule that contract claims will not be insisted upon by international action has been repeatedly set aside by modern practice, where otherwise gross injustice would have been perpetrated. In so developing, the evolution of international law is following in the footsteps of the evolution of municipal law.

Going back to the history of municipal law, we find that in its early infancy the only rights as to which any remedies were allowed were crimes. These, at first, merely entitled the injured person or his heirs to a fine.[11] The recognition of the interest of the state in crimes had to await the development of kings. Following this came the recognition of remedies arising out of civil torts, which in the first instance were only recognized as *quasi*-crimes giving individual remedies, and then later on as torts proper. At first no remedies were given on contracts. For, as a matter of fact, since contracts themselves had no place in early civilization, the law of contracts did not exist in municipal law. The law of contracts forms so large a part of our modern municipal law that to say it once had no existence would seem an absurdity. Yet this is true. Maine has shown how the progress of man in society has been a progress from status to contract,[12] and Herbert Spencer enforces the same truth.[13] Within historic time, contract has slowly and painfully developed with the growth of confidence among men.[14] Contracts evidenced by the seal of the party charged, were among the first to be recognized and enforced by the English law. Again, the executed contract of sale, where the property was delivered and the money paid — the *nexum* of the Roman law — seems to be the first contract that the law of Rome and of England took upon itself to

[11] See the Icelandic Saga of Nial, Vol. 10, Anglo-Saxon Classics, 96, 108, 181, 183, Chapters 37, 43, 71, and 72.

[12] Maine's Ancient Law, Chap. IX.

[13] Principles of Sociology — Political Institutions.

[14] Maine's Ancient Law, Chap. IX; 2 Pollock and Maitland, History of English Law, 46; Holmes' Lectures on the Common Law.

protect.[15] Then the courts began to enforce a half-executed sale; so that when a vendor proved a delivery, and a promise, the burden was on the vendee to show payment, the *real* contract of the civil law. And from the time of Henry IV (1399 A. D.) to that of Henry VII (1509 A. D.) a great conflict rages between the authorities as to whether the courts will enforce mutual oral promises, the "Consensual" contracts of the civil law, where witnesses alleging the contract were unsupported by proof of an act of the party charged in itself corroborating circumstantial evidence. The final result was to establish a recovery in this class of contracts. For the evolution of contracts in municipal law see the note.[16]

[15] Maine's Ancient Law, p. 310.

[16] The first case (2 Henry IV. 3b) was a nonsuit because no covenant was produced (using covenant in the sense of a written promise under the party's seal). Yet, Bryan, J., admits the action would lie if the defendant begins to act. In 2 Hen. IV. 33a, a suit for damages for not building a house, Thirning, Ch. J., says: "But when a man makes a covenant" (using covenant in the sense of an oral promise) "and will not perform any part of such covenant, how shall you have your action against him without specialty?" (meaning a written instrument under his seal). And in Keilway, 78, pl. 5, S. C. 21 Hen. VII. 41, Frowicke, Ch. J., says: "If I covenant" (using covenant in the sense of an oral promise) "with a carpenter to build a house and pay him £20 to build the house by a certain day and he does not do it, I have a good action on the case by reason of the payment of the money; and without payment of the money in this case no remedy. And yet if he make the house in a bad manner, an action upon the case lies, and so for nonfeasance if the money be paid action upon the case lies." So also "Si un ferrier assume fur luv a curer non chival que est gravelled on ses paes * * * action sur le case gist fur cest matter sans allege ascum consideration, etc." 1 Rolle Abr. 10; S. P. 2 Hen. VII. 11. See further Hen. IV. 14; Martin, J., in 3 Hen. VI. 36b, 37a; 14 Hen. VI. 18b, pl. 58; 19 Hen. VI. 49a, pl. 5; 20 Hen. VI. 34a, pl. 1. The result was that the English courts of that day did not enforce a contract evidenced only by mutual promises — the "*consensual* contract" of the civil law. It will be noticed that the earlier authorities and those sustaining the rule "No action lies for a nonfeasance" pay no attention to the presence or absence of a consideration, *i. e.*, the existence of the reciprocal promises. And the distinction drawn between assumpsit and case does not affect our argument; for the point insisted upon is, that the old rule was: "No action shall be brought upon any special promise unless the testimony of witnesses is corroborated by proof of one of three overt acts of the party charged." These were his seal, his acting in according with the promise, or his acceptance of the consideration. (Holmes, in his Lectures on the Common Law, says (p. 264) "The rule was laid down; by parol the party is not obliged * * * from Edw. I. to Henry VII. we find no case where a debt was recovered,

Thus we can trace in municipal law the steps wherein rights and remedies were established; first, as to crimes, treated as acts of private war entitling the offended party to the recovery of a fine, next as affecting the state;[17] second, as to torts treated as *quasi*-crimes; third, as to civil torts proper; fourth, as to the completed contract of sale — the *nexum* of the civil law; fifth, as to partially executed contracts, the real contract of the civil law; and sixth, as to consensual contracts. For the proof of this historical development, see Maine's Ancient Law, Ch. IX.; Holmes' Common Law; 2 Pollock & Maitland's History of English Law, ch. V.

It follows that it is both the right and the duty of a government, not only according to precedent, but according to principle, and the true evolution of systems of law, to intervene to protect the rights of its citizens as against gross injustice whether the same results from a breach of international obligation arising out of a tort, or in the breach of international obligation arising out of a contract.

unless a consideration had in fact been received.") The protection this rule afforded against perjury was, that manufactured evidence of an overt act of the party himself can be met by direct disproof. This is so unless the alleged act is laid as having been done so long before that witnesses are dead, receipts lost, or a false interpretation can be put upon it without fear of a direct rebuttal. It is this exception that led to the Statute of Limitations.

The ancient rule was found so safe that a relaxation of its strictness was thought just, and finally prevailed in the time of Henry VII. This change consisted in allowing the mere proof of the existence of a consideration to be sufficient to corroborate witnesses, namely, in allowing proof of the existence of one oral promise to be a consideration for the enforcement of the other oral promise.

In view of the rule of common law that inadequacy of consideration did not affect the validity of the contract and the large gains without damage to the plaintiff resulting from obtaining damages on certain classes of these consensual contracts, notably on alleged oral contracts to pay the debts of another person, such perjury occurred, resulting finally in the passage of the Statute of Frauds. This statute prevented oral evidence wherein perjury was likely to be most advantageous to the suborners of perjury and most dangerous to the community. So, likewise, the later Statute of Limitations and Lord Tenderden's act covered other dangerous developments of perjury arising from the relaxation of the ancient rule above referred to.

[17] Stephens, History of the Criminal Law of England, 60; Stephens, General View of the Criminal Law of England, 8, 9; 1 Pollock and Maitland, History of English Law, 46; Saga of Nial, 10 Anglo-Saxon Classics, 96, 108, 181, 183, Chapters 37, 43, 71, and 72.

Accordingly, as in municipal law, we see the gradual evolution of the right of recovery, first, only as to crimes, treated as torts; then crimes proper, treated as offenses against the state; then as to civil torts; and next, as to contracts, through their varying complexity of *nexum,* real and consensual contracts; so may we in international law see a parallel evolution, from the enforcement of claims for private torts, through the enforcement of claims for breach of contract with a tortious element such as seizure of property, up to claims for pure breach of contract alone.

The matter standing thus on principle and practice, the astute lawyers of certain debtor nations, much disliking any interference with their autonomy by reason of the enforcement of such a principle in international law, early devised a clever way out of the wilderness. This is what is known as the Calvo clause.

This is a clause whereby in a government concession the concessionaire binds himself that in case of any dispute between the parties as to the validity or terms of the contract, the same shall — using the typical Venezuelan form —

be decided by the tribunals of Venezuela conformably to the laws of the Republic, and that such contract shall in no case afford a ground for an international reclamation.

This clause inserts the alleged rule of international law that resort for redress must first be had to the courts of the country as a contract stipulation between the parties, and adds a further express disclaimer of all right to obtain redress for any wrong by application to the country of the foreigner's citizenship.

The clause proved itself a difficult one to meet at first. The suspicion of its smartness, cleverness and ingenuity, more acute than sound in the first place, contemplating possible indefensible breaches of the contract on the part of the contracting government; and, in the second place, providing against any possibility of redress, crops out of its mere inspection. It bears a close analogy to the old conveyance brought before an English court in Elizabethan times. In that case the insolvent debtor, in conveying his property to a third party in order, in fact, to cheat his creditors, solemnly covenanted with said third party "*it is expressly stipulated and agreed that*

this deed is not made in fraud of my creditors." Short work was made of that clause by that sturdy old court. More successful in some of the earlier instances has been the Calvo clause.

The clause has been before arbitral tribunals with varying results, for which see the note.[18]

[18] In Day & Garrison *v.* Venezuela, No. 38, Mixed Commission, United States & Venezuela, 1885, where the clause provided for an arbitration, the arbitrators differed. Findlay, American, and Andrade, Venezuelan, holding the clause a bar, and John Little, American, holding that since the government repudiated the contract as invalid,

its action closed the door, therefore, to arbitration, and the failure to resort to that means of adjustment cannot, in my judgment, be rightfully set up as a defense here in its behalf. (4 Moore Int. Arb., 3564.)

In the case of the North and South American Construction Co. *v.* Chile, No. 7, United States & Chile Commission of 1892, the arbitrators held that Chile, having suppressed the tribunal provided for by the contract, the clause was no bar. (3 Moore Int. Arb., 2318.)

Again, in the bond claims of Woodruff and Flanagan, Bradley Clark & Co. *v.* Venezuela, Nos. 20 and 25, United States & Venezuela Arbitrations, 1885, the same commissioners, Findlay and Andrade, ruled that the clause was a bar to the claim. Judge Little indirectly expressed the true principle applicable to these circumstances, as follows:

Such language as is employed in Article 20 [the Calvo clause] contemplates the potential doing of that by the sovereign towards the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances, whenever that situation arises, that is, whenever a wrong occurs of such a character as to justify diplomatic interference, the government of the citizen at once becomes a party concerned. Its rights and obligations in the premises can not be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable. He, in my judgment, can no more contract against it then he can against municipal protection. (4 Moore Int. Arb., 3567.)

The case, having been dismissed, came again before the mixed commission, United States & Venezuela, 1903. The arbitrators having differed, the matter was left to the Umpire, Henri Barge. He held that since the claimants had not applied to the Venezuelan courts, the claim was not yet in a position to be passed on by an arbitral tribunal, and dismissed the case "without prejudice, on the merits." Mr. Barge further held with bland insouciance the following contradictory propositions: First, that no precedent agreement of its citizen could prevent a foreign government from making international reclamation in his behalf, and, secondly, that this did not prevent the citizen from being bound by his own agreement that he will never appeal to other judges than those he has agreed on. Thereupon, under conditions where the government of the citizen had disregarded the clause in the contract, and by international reclamation forced it to arbitration (by necessary implication to be held upon the merits because

So far as concerns the foreign offices of various powers, the Calvo clause has not met with much success.

The United States early took the ground that the existence of this clause did not preclude their diplomatic intervention in favor of the claimant in any case of denial of justice, using denial of

the protocol in question read that the decision should be made on the basis of "absolute equity"), the same learned jurist dismissed the claim without deciding it on the merits, and blandly asserted that this result is one which leaves "untouched the right of his government to make his case an object of international claim whenever it thinks proper so to do." (Venezuelan Arbitrations of 1903, Ralston's Report, 158–161.)

Query, how often must the government of the wronged citizen make his case an object of international reclamation before it may be passed upon on its merits by an international arbitrator?

Again, in the Rudloff case, the reclamation clause was before Mr. Barge, and he held its existence to be no bar to the claim and awarded damages. (Venezuelan Arbitrations, 1903, pp. 182, 183–200.)

But in the Orinoco Steamship Company's Case *v.* Venezuela, and again in the Turnbull Manoa Co. Limited, and Orinoco Co. Ltd. *v.* Venezuela, the same Mr. Barge held the clause an absolute bar, resulting, in the Orinoco case, in the dismissal of a damage claim of over a million dollars. (Venezuelan Arbitrations, 1903, pp. 90, 91, 244, 245.)

These contradictory decisions, absurdly reasoned, and resulting in mutually destructive conclusions, fit only for *opera bouffe*, would afford material for the gaiety of nations, were it not that the ripple of laughter dies on the lips when we consider the gross injustice thus perpetrated on private claimants. Decisions such as these have retarded the cause of international arbitration as a solvent for the disputes of nations beyond any possibility of computation. They deserve to be set in a special pillory of their own, so that international arbitrators shall know that however absolute their authority may be in the case in hand, there is a body of public opinion which will fearlessly criticize and condemn such absurd and despotic rulings, and so that at least the possibility of a just criticism shall have its full effect as a deterrent cause in preventing the repetition of such offenses.

But now to other and better reasoned precedents.

In the case of the Ciro and La Vela Railway and Improvement Company damages were allowed in spite of the existence of the clause. (Venezuelan Arbitration, 1903, 174.) So in the case of Virgilio del Genovese (Venezuelan Arbitrations, 1903, 174).

In the La Guira Electric Light & Power Company, Bainbridge, the American Commissioner, in an opinion concurred in by Paul, the Venezuelan Commissioner, speaks of the difference between a claim founded on a contract with some one else than the government, and says:

The case is very different from one in which the government itself has violated a contract to which it is a party. In such a case the jurisdiction of the

justice in its strict sense.[19] Later, however, without strict denial of justice in its limited sense, this government has repeatedly demanded and obtained international arbitration of claims where such a clause existed, and without requiring the claimant first to exhaust his remedies in the foreign court.

See all the American claims against Venezuela above cited, which thus involved the double question of

1st. Was there a rule of international law which required an arbitral tribunal to dismiss a claim where no recourse had been had to the court of the country?

2d. Was this alleged rule more binding when supported by a Calvo clause in the contract?

The later practice of the United States, Great Britain, Italy and

Commission under the terms of the protocol is beyond question. (Venezuelan Arbitrations, 1903, pp. 175–182.)

In Selwyn's case, Plumley, Umpire, held that the clause was no bar to the decision on the merits. (Venezuelan Arbitrations, 1903, 322–327.)

In Martin's case, Ralston, Umpire, held likewise, using this trenchant language:

Venezuela and Italy have agreed that there shall be substituted for national forums, which, with or without contract between the parties, may have had jurisdiction over the subject-matter, an international forum, to whose determination they fully agree to bow. To say now that this claim must be rejected for lack of jurisdiction in the mixed commission would be equivalent to claiming that not all Italian claims were referred to it, but only such Italian claims as have not been contracted about previously, and in this manner and to this extent only the protocol could be maintained. The umpire can not accept an interpretation that by indirection would change the plain language of the protocol under which he acts and cause him to reject claims legally well founded. (Venezuelan Arbitrations, 1903, 840–841.)

In the Delagoa Bay Railway Case, in which a contract contained a similar clause providing for an arbitration, Mr. Blaine, U. S. Secretary of State, claimed that Portugal, having broken the contract, could not hold the other party to the arbitration clause, and demanded an international arbitration. This having been had, the existence of the clause was held no bar, and the claimants recovered about $4,750,000. (U. S. Foreign Rel., 1900, p. 903; U. S. Foreign Rel., 1902, pp. 848–852; 2 Moore's Int. Arb., 1865–1899, as cited in 6 Moore's Dig. Int. Law, 728.)

Again, in the leading case known as El Triunfo Case, the arbitrators held the existence of the clause no bar to the claim. (U. S. Foreign Rel., 1902, pp. 838–880, especially pp. 839–871; 6 Moore's Dig. Int. Law, 732.)

[19] 6 Moore's Dig. Int. Law, 293.

Germany has been to repudiate (so far as concerns Latin-America) both the alleged rule of international law, and likewise the Calvo clause.[20]

In other words, where the contract is one to which the government itself is a party, and that government has committed the alleged breach, it is considered to be a futile thing for the private party to seek redress in the courts of that country. This conclusion is supported by the following reasoning. When the injustice alleged arises from breach of contract between the claimant and a foreign government which is itself a party to the contract, the right to intervene and enforce the claimant's right by international pressure is clear. For, in a case where the foreign government can not be sued upon the contract (as is the common-law rule), there is a clear right of diplomatic intervention in the absence of other remedy. And in the case where suit is allowed against the foreign government in its own courts, it is likely that such a remedy results in more apparent than real justice.

Hall says:

> When an injury or injustice is committed by the government itself, it is often idle to appeal to the courts; in such cases and in others in which the act of the government has been of a flagrant character the right naturally arises of immediately exacting reparation by such means as may be appropriate.[21]

While it is generally established by the practice of civilized nations, that a country will not intervene on a contract claim on behalf of one of its citizens against a citizen of a foreign government, such rule is predicated upon the fact that the country against whom the claim exists, will do equity in the case; and that is possible because the claim originally was between citizen and citizen, and in such a case the government could do equity as easily as it would in any other cause in which it was not personally interested, except to do justice.

But the case is varied when the claim, although it is of a contract nature, is not against the citizen but against the state itself, which

[20] 6 Moore's Dig. Int. Law, 300.
[21] Int. Law, 5th ed., 279.

thus becomes a party to its own suit, in its own tribunals, and, to a certain extent, judge of its own cause.[22] Especially is this situation accentuated when, as in the case of the Latin-American republics, the executive against whom the claim is alleged is a controlling influence in the government, and the legislative and judicial departments are but mere agents subservient to the executive will.

Aside from the foregoing considerations, the no-reclamation clause is void under well-recognized principles of municipal and international law.

The effective part of the clause is "and in no case can they become the foundation for international claims."

The parallel in municipal law to this covenant may be found in those stipulations made between contracting parties which are designed by the agreement of the parties to oust the jurisdiction of municipal courts.

It is settled in municipal law that a provision that all matters of dispute arising shall be arbitrated is not binding. The party to the contract may sue, and the merits of his case are investigated by the court, notwithstanding his breach of this covenant. The covenant is declared to be against public policy, since the courts are established for the purpose of determining these questions.[23]

It is declared that it is against the public policy of municipal law "to sanction contracts by which the protection which the law affords the individual citizens is renounced."[24]

The units of the municipal law are the individual citizens composing the state, and over them is established a central legal authority and court having the jurisdiction and power to decide disputes between them, and to enforce its decrees.

The units of international law consist of the sovereign individual states, and over these there is no established central authority and no court having jurisdiction of international disputes with

[22] Dr. James Brown Scott in Venezuelan papers sent to Senate, U. S., 1908.

[23] Haggart *v.* Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Delaware & Hudson Canal Co. *v.* Pa. Coal Co., 50 N. Y. 250, 258; National Contracting Co. *v.* Hudson River Water Power Co., 170 N. Y. 439, 442; Hamilton *v.* Liverpool, etc., Ins. Co., 136 U. S. 254, 34 L. Ed. 419.

[24] Delaware & Hudson Canal Co. *v.* Pa. Coal Co., 50 N. Y. 250, 258.

the power to enforce its decrees. In lieu of such an established international forum there remains to remedy any international wrong the process of intervention by the state of the citizen wronged. This is done through the state applying by suggestion of good offices and intervention to obtain an arbitration; or, if that fails, by its intervention by war, to redress the injuries perpetrated by the foreign state upon its citizens.

In the question of whether such injuries shall be settled or waived, or in what court, and under what circumstances, and before what tribunal such claim shall be adjusted, the sovereign state, whose citizen has been injured, has an independent right to determine for itself the punishment to be meted out for the wrong, or the remedy which should be sought, independent of the rights of the citizen himself to such remedies. For a wrong done to a citizen of a state by foreigners in a foreign land is, under such circumstances, an insult and an indignity heaped upon the state to which such citizen belongs, and, as such, is resented as an insult or injury to the body politic itself.

The principle is as old as the imperial rule of the Romans, whose *Civis Romanus sum* was a passport and a safeguard throughout the world.

Both, then, because of this right in the body politic to remedy or avenge a wrong done to one of its members in its own way, and because the only proper forum for the settlement of international disputes is the international forum standing for these disputes in the same place as the municipal courts for the disputes of nationals, namely, international arbitration, any stipulation whereby a citizen of a sovereign state relinquishes the right of that state to procure for him, through the international forum aforesaid, a remedy on the merits for his wrongs, is absolutely void and contrary to public policy.

The Governments of Great Britain, United States and Germany have, in view of the foregoing considerations, consistently insisted that the no-reclamation clause in the Venezuelan contracts is of no validity.

So stood the theory and the practice as to forcible intervention to

enforce damages for breach of contracts made with a sovereignty prior to the last Hague Conference.

As is usual in such cases, the theories were in dispute, but the practice was a fact. And, as the last word of the cannon is more compelling, if not more convincing, than the last word of the pen, the Venezuelan bombardment of 1902 had, for the time being, squelched the opposing syllogism.

Scarcely, however, had the roar of the guns of the allied fleets reverberated along the Venezuelan shores when the pen again began, with steady flow of ink, to prove why these things ought not to be.

On December 29, 1902, Dr. Luis M. Drago, Minister for Foreign Affairs of Argentina, took occasion to write a note to the Argentine Minister at Washington, and so was launched the modification of the Calvo clause or doctrine, known as the Drago Doctrine — alleged rules of international law, as dear to the hearts of our South American brethren as the Monroe Doctrine to our own.

Briefly stated and distinguished, these doctrines are as follows:

> Calvo denies the right to employ force in the pursuit of all claims of a pecuniary nature * * * on the grounds that the admission of such a principle of responsibility would establish an unjustifiable inequality between nationals and foreigners and would undermine the independence of weaker states. He does not even admit that the ordinary channels of diplomacy are open to claimants in such cases.[25]

On the other hand "Señor Drago merely denounces armed intervention as a legitimate or lawful means of collecting public debts."[26]

Both the Calvo and Drago Doctrines, in ultimate analysis, are based on the axiom of international law "All sovereignties are free and equal." Being so in legal fiction, any interference of one nation with another on grounds disputed between them is not an act of justice, but an act of might — the strong against the weak — might, not right, ruling the case. Such act is contrary to justice, ergo, there can be in the eye of international law no lawful intervention by force of one nation against another to enforce such claims.

[25] Hershey on the Calvo and Drago Doctrines, 1 Am. Journal of Int. Law, 31.
[26] *Ibid.*

All other arguments used to prove the inexpediency of resorting to force as between nations to compel justice in such cases, are mere considerations of expediency, and not of right. In addition, they apply with almost equal force to all other classes of claims of private citizens of one nation against another, and if given conclusive weight would result in preventing reclamation in cases in which it is now recognized as entirely proper.

In other words, their arguments of expediency prove too much. They would, if always given full weight, make poltroons and cowards of us all, while in fact they are considerations of policy, not of justice — and justice is the all important goal.

Again, the axiom that all nations are free and equal — what a misleading one it is! Nations may be free, but not so free as to act with injustice towards other nations, or their citizens. And nations are not equal in the sense that they are equal in honesty, equal in integrity and equal in a sense of justice, any more than they are equal in wealth, or in numbers, or in power.

The Spanish proverb says that *"Men are as good as God made them, some a good deal worse,"* and so likewise with nations. What fools we mortals be if in the face of the fact we allowed ourselves to be beguiled by the fiction.

It follows, then, that, in principle, both the Calvo and the Drago Doctrines are a mere play on words, a rattling of counters, not an argument on things as they are. And this is all the more true because of the primitive condition of the world so far as concerns the relations of the nations in it, even in this late year of Grace, 1910. Not now, if ever in the millenium, have we a parliament of the world, and courts, and police of the world.

Each nation stands toward another without these modern appliances of civilization, more lonely, more unprotected, more dependent alone upon its own might and power for its existence and continuance (save only for the sympathy and altruism that centuries of dwelling under conditions of municipal law have developed in individuals) than the man of the Stone Age. For he had a family and a tribe to aid and succor him, while the nation stands alone, like a rogue elephant in its conflict with another.

A decade which has seen the Russian and Japanese treatment of China and Korea and Manchuria, has seen the Russo-Japanese War and its causes and effects, has seen the later observance, or lack of observance, of treaties in regard to the open door and other matters in Korea and Manchuria, has been dependencies of Turkey become provinces of Austria-Hungary, can hardly need further object lessons to bring this unpleasant, ugly truth home to its observers.

In the absence, then, of courts having jurisdiction over nations as municipal courts have jurisdiction over individuals, and on the refusal of a nation to redress a wrong, no recourse save force, save war, remains to the nation whose citizen is alleged to have been injured. For to allow mere *ipse dixit* of the alleged offending nation to the effect that no wrong has been done to conclude the matter, is to condemn the private claimant without a trial, and to make the accused nation a judge of its own case.

Nor is the case much improved by the suggestion that the claimant must seek redress in the domestic courts of the nation accused. All our knowledge of men and things, our local knowledge, cries out against the hyprocrisy of such an argument. What meed of justice do our city men get in the country courts against the farmers, or *vice versa,* and our United States Circuit Courts in the various States, so far as their jurisdiction is dependent on diverse citizenship ousting the State courts, is a constitutional recognition by our forefathers of facts as they are, not as they exist in theory, even as respects justice between the citizens of the various States, parts of our Union.

It follows, then, that the right, in the last analysis, to the exercise of force to compel restitution on contract claims in international law is supported by fundamental reasons of justice and of public policy.

On principle, the meaning and scope of the maxim *ubi jus ibi remedium* should be the same in both the municipal and international law.

Is it possible, then, that we must follow up such claims in every case by war?

The answer is "No." The argument leads to no such conclusion.

It is based on the absence of a proper court to try the case, and on the necessity of seeking some other redress. But the proper court to try such a case is an arbitral tribunal. Hence, to such a tribunal should such a case go for decision, for otherwise the strong would, without trial, compel the weak to do its bidding.

On principle, then, the right to the use of force is limited by the necessity of first offering an international arbitration and abiding by its decree if one is had. And this principle has now become substantially a part of the law of nations both in theory and in practice. The Venezuelan bombardment and the Drago note brought the issue squarely before the nations.

At the third Pan-American Conference in 1906, Mr. Root, while strongly supporting the proposition that contractual claims should not be collected by force, suggested that it would not be proper for the debtor nations there assembled to give utterance to a rule, but that the better course would be to request the coming Hague Conference, where both creditor and debtor nations would be assembled, to consider the subject. Accordingly, a resolution was passed recommending that the Hague Conference

consider the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.[27]

In the second Hague Conference held in 1907, the United States of America presented a proposal

for the limitation of the employment of force in the recovery of ordinary public debts having their origin in contract.[28]

The proposal as at first made provided that in order to prevent conflicts arising over such matters and

to guarantee that all contractual debts of this nature which shall not have been settled peaceably through the diplomatic channels shall be submitted to arbitration, it is agreed that a recourse to no measures of coercion involving the employment of military or naval force * * * shall take place until an offer of arbitration has been

[27] 1 Scott Hague Conferences, 399.
[28] *Ibid*, 400.

made by the creditor, and refused, or left without response by the debtor, or until the arbitration has taken place and the debtor state has failed to conform to the sentence rendered. * * *[29]

The discussion which followed the introduction of this proposal was illuminating and can be found ably summarized in the interesting pages of Dr. Scott's *Hague Conferences*. General Horace Porter made an able speech in support of the American proposal. Dr. Drago for the Argentine Republic accepted the arbitration part of it, while reserving from its operation the public debts involved in the Drago Doctrine as distinguished from the Calvo Doctrine. Brazil, through M. Barbosa, proposed to amend so as to declare against a war of conquest.[30]

Venezuela voted for the renunciation of force, but would not bind itself to arbitrate.[31]

Great Britain, Germany, France, and Austria-Hungary, accepted the proposition without reservation. Italy, Spain and Japan reserved their vote. Russia seconded the proposal but limited it to future obligations.[32]

Sweden objected on the ground that the proposal gave direct sanction for war if there were no consent to arbitration.

Roumania and Belgium called attention to the fact that the proposition called for compulsory arbitration of contract claims and contained no reservations. They abstained from voting.

Switzerland opposed the proposition as derogatory to her courts.

At the end of this discussion in the first commission July 27, 1907, the American proposition was approved by a vote of thirty-six votes, none against and eight abstentions (Belgium, Greece, Luxemburg, Roumania, Sweden, Switzerland, Turkey and Venezuela).[33]

Thereafter the draft was revised to meet criticisms, especially that of Sweden, that it recognized the right to use force in case of refusal to arbitrate, in such a way that the first paragraph should

[29] *Ibid*, 400.
[30] *Ibid*, 412.
[31] *Ibid*, 412.
[32] *Ibid*, 413.
[33] 1 Scott Hague Conferences, 415.

merely renounce the right to use force and the second provide that the debtor state by refusal to arbitrate should lose the benefit of the renunciation.[34]

The important clauses were then passed in the following form:

The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.[35]

The final vote was thirty-nine in favor, none against, five abstentions (Belgium, Roumania, Sweden, Switzerland and Venezuela). There were, however, various objections in the form of reservations.[36]

Then Argentine made the following two reservations: First, so far as concerned ordinary contract debts between citizens and the foreign government, resort should be had to arbitration only in specific case of denial of justice after recourse to local courts. Second, public loans cannot in any case give rise to military aggression. The first reservation restored most of the Calvo clause and doctrine. The second makes the convention nugatory as to claims on public loans.

The Peruvian reservation preserved the Calvo clause.[37]

By reason of the guarded language of the proposal as finally adopted, Dr. James Brown Scott says that the result of these proceedings at the Hague Conference is to leave the international law on the subject just as it was before.[38]

This conclusion is sustained by the following reasoning: the first clause forbids force, the second provides that the debtor nation shall have no right to insist on the benefit of the renunciation in the first clause, if it has refused to arbitrate, etc. Consequently, where

[34] *Ibid*, 415.
[35] 2 Scott Hague Conferences, 357; 1 *ibid*, 415.
[36] 1 Scott Hague Conferences, 416–417; 2 Scott Hague Conferences, 532, 534.
[37] 1 *ibid*, 417.
[38] Scott's Hague Conferences, 415.

arbitration is refused, both clauses become *functus officio,* the convention does not apply, and we must seek for light in the former condition of the law.

With all due deference to so high an authority and to the argument presented, this statement as to the net result of the Hague Convention on this subject appears not to be entirely accurate. The fairer construction appears to be as follows:

The convention, as a writing, must be construed as a whole as it stands in final form. The nations had disputed among themselves as to whether it was a just doctrine that force should be used to enforce a contract claim of the national of one government against another government. They met in solemn conclave to agree on a decision of this question which should furnish a just rule of law for their future guidance. Under such circumstances they agree not to have recourse to force to recover on contract debts. Then is added a clause that this undertaking is not applicable when the debtor state refuses, etc., arbitration.

The implication is obvious that since the covenant not to use force is inapplicable when the debtor state has refused arbitration, etc., the right to use force under the conditions stated is impliedly assented to.[39]

In any event, and without regard to any metaphysical discussion of the precise language used in this convention, the fact that the great nations, Great Britain, Germany, Italy, France, Russia, and perhaps the United States of America, are committed to the right to use force when arbitration is refused, and since their conclusions in that regard are shown to be founded on true principle and true justice, we may take it for granted that the doctrines of Calvo and of Drago are now as dead as Dickens says Old Marlor was — that is, *" dead as a door nail."*

The CHAIRMAN. The discussion of this subject will be continued by a paper to be read by Mr. C. L. Bouvé, of Washington.

[39] Up to date this Convention, which was subject to ratification by the several governments, has been ratified by only the United States of America (2 Scott's Hague Conferences, 361). It stands, however, as the formal expression of opinion of a congress of eminent jurists as to what the principle of international law should be.

ADDRESS OF MR. C. L. BOUVÉ, OF WASHINGTON, D. C.,

ON

Intervention for Breach of Contract or Tort Where the Contract is Broken by the State or the Tort Committed by the Government or Governmental Agency.

This article deals with intervention by this government on behalf of its citizens resident abroad for injuries suffered by them in consequence of a breach of contract or a tort when the contract is broken by the foreign state, or the tort committed by the government or governmental agency.

It is proposed merely to touch upon the rights and obligations of the United States with regard to the protection of its citizens resident abroad from three standpoints only: that of the Hague Peace Conference of 1907, that of the precepts of international law as expressed in the works of recognized authorities on the subject, and finally that of the national policy adopted by the United States in this regard. This discussion will furthermore be limited in a general way to cases originating in contract, assuming that as to those arising purely in tort this country has very generally exercised its unquestioned right of intervention.

The object of the convention entered into at The Hague respecting the limitation of the employment of force for the recovery of contract debts is, as its preamble states, to avoid "between nations armed conflicts of a pecuniary origin arising from contract debts which are claimed from the government of one country by the government of another country as due to its nationals."[1] The first and second articles of this convention read as follows:

ARTICLE 1.

The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor state

[1] Scott: The Hague Peace Conferences of 1899 and 1907, Vol. II, p. 357.

refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, pervents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.

ARTICLE 2.

It is further agreed that the arbitration mentioned in paragraph 2 of the foregoing article shall be subject to the procedure laid down in Part IV, Chapter III, of the Hague convention for the pacific settlement of international disputes. The award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment.[2]

Mr. Crammond Kennedy, in his address delivered before this Society on April 19, 1907, and duly published in its proceedings,[3] dealing with the question "Is the forcible collection of contract debts in the interest of international justice and peace?" said, with reference to the enforcement of pecuniary obligations between nations:

* * * when the amount or the equity of the obligation is in doubt, and impartial arbitration is proposed by the debtor government it should be accepted by the creditor.

The learned author adds in the note which he subjoins:

This may now be said to be substantially the international law on the subject, in view of the convention adopted at The Hague to the effect that contractual debts shall not be collected by force unless impartial arbitration, proffered by the claimant government, is either declined, or unreasonably delayed, or the awards of the arbitrators are left unsatisfied, by the debtor government.

It would seem that far from denying the right of nations to employ armed force for the purpose of enforcing the fulfillment of contractual obligations, the terms of the convention tacitly admit the existence of such an international right, but limit its exercise under the conditions specified. They merely make it incumbent on the demandant sovereign to propose arbitration to the debtor state,

[2] *Ibid*, p. 357.

[3] Proceedings of the American Society of International Law, held at Washington, D. C., April 19 and 20, 1907, p. 121.

leaving open to the former those remedies of which it may avail itself in the exercise of a national or international policy in case the debtor fails to meet the offer, or after accepting the same, hinders such further action as should naturally be consequent thereon, or fails to submit to the award.

Assuming in a given case that the debtor state places itself outside the protection afforded by the terms of the convention, what shall form the basis of diplomatic intervention by the demandant state? It can not consist in the mere failure of the recalcitrant state to arbitrate on the ground that such failure constitutes a breach of international good faith, for it is to be noted that the high contracting parties do not bind themselves to arbitrate. It would seem otherwise when the debtor state, after accepting the offer, prevents any *compromis* from being agreed upon, or fails to submit to the award after the decision is rendered; for such acts might well be deemed devoid of the mutual good faith indispensable to the friendly and profitable intercourse of nations, and draw down upon the delinquent state the consequences which the convention was framed to avoid. In view of the fact then, that mere failure to arbitrate can not be held a violation of the terms of a convention which do not make arbitration obligatory on the parties to the undertaking, and in view of the further fact that such failure does not as yet, at least, constitute a breach of the accepted rules of international conduct, it would seem that intervention on the part of the state demandant must in such case still depend for its justification on the familiar governing principles of international law or on the precedents established by an accepted national policy. For this reason a brief consideration of both law and policy is thought not out of place in this connection.

Vattel, after pointing out the duty and obligation on the part of the state to preserve itself, continues:

> If a nation is under the obligation of preserving itself, it is no less under that of preserving most carefully all of its members. It owes it to itself; for to lose any one of its members, is to weaken itself and do violence to its own self-preservation.[4]

[4] Le Droit des Gens, book 1, Chap. 2, Sec. 17.

But all purposes of self-preservation on the part of a state are not served by merely protecting the life of the citizen or subject; the protection of his property as well as his life tends toward and is a necessary element of the self-preservation of the state.

Property even of private persons in their totality must be regarded as the property of the nation from the point of view of other states. It actually belongs to it in a certain sense because of the rights which it has over the property of its citizen, because it is a part of the collective wealth of the state and increases its power. It is of interest to the state on acount of the protection which the latter owes its members.[5]

It is thus evident that the source of the protection extended by a state to its citizens is the obligation on the part of the state to preserve itself; and that the protection granted for this purpose extends, not only to the life and physical welfare of the subject or citizen, but to his property as well. It would seem that the state is bound to protect him as long as the relationship between sovereign and citizen exists.

The citizen or subject of a state who absents himself for a time without the intention of abandoning the society of which he is a member does not lose his quality by his absence; he preserves his rights and remains bound by the same obligations.[6]

The fact that the assumption of rights and obligations incident to foreign residents does not affect those incident to citizenship once conceded, it follows that the right of a state to protect its citizens resident abroad is identical with the right to protect them as citizens at home; and being identical, must be based on the same source — that of self-preservation of the state. This idea is inferentially conveyed by Hall when he deals with the subject of protection of citizens abroad under the chapter entitled " Self-Preservation." [7]

Inasmuch as the foundation of the right to protect citizens abroad would seem to be the self-preservation of the protecting state it would

[5] *Ibid*, Chap. 2, Sec. 81.
[6] Le Droit des Gens, book 2, Chap. 8, Sec. 107.
[7] Hall, Int. Law, p. 291, Sec. 87.

appear to follow that *any* act of a foreign state injurious to the life, liberty, or property of citizens abroad justifies intervention of some kind on the ground given. Aside from the question of policy, such a broad exercise of the right is restricted within certain limits to a generally accepted rule of international conduct governing the subject. The measure of that restriction is necessarily limited, however, to a fair application of the municipal laws of the foreign country, provided, of course, that those laws meet the standard of modern civilization; for, as it is the duty of every sovereign state when it once unconditionally admits strangers within its borders, to apply its local laws fairly as to them, it can demand the same from any foreign country by whom free and unconditional access to its own nationals is granted.[8]

The rule of international law above referred to and limited in its application to cases where the injury is the result of the act of the sovereign or its duly constituted authorities may be briefly stated as follows:

A state may intervene for the protection of its citizens abroad for injuries received to life, health, liberty, or property by the act of a foreign government, or its duly appointed authorities, where the injury constitutes a violation of the municipal law or is the result of a refusal to apply it with fairness, and where the interests of the state call for protection of individual rights on the ground of self-preservation.

The principles governing intervention when the wrongful act is committed by the sovereign or his duly constituted authorities differ from those applicable where the tort is the act of a private individual in this, that whereas in the second instance the country whose citizen is injured is bound to assume that the injured party will be able to obtain ample redress in the local courts and is therefore not justified in intervening until failure to punish the offender, or other acts amounting to a denial of justice show to the satisfaction of the claimant state that it is not the intention of the offending government to exercise that impartiality in the administration of its laws

[8] Vattel, *ibid*, book 2, Chap. 8, Sec. 104; Pradier-Fodéré, Traité de Droit Int. Pub., Vol. 1, p. 349, Sec. 204; Hall, Int. Law, 4th ed., Chap. 7, Sec. 87, p. 291.

which the law of nations demands, in the first instance the unlawful and tortious act by the state itself or by its authorities, if not disavowed by the state, amounts to an admission that the sovereign does not consider itself bound by its own municipal law, and thus justified immediate intervention on the part of the offended state. It is obvious in the last case mentioned that an offer on the part of the offending government to submit the matter to the decisions of its own tribunals on the ground that local remedies must be exhausted before diplomatic intervention on behalf of the claimant can be properly exercised by the latter's government, calls for no consideration.

When an injury or injustice is committed by the government itself it is often idle to appeal to the courts. In such cases, and in others in which the act of the government has been of a flagrant character, the right naturally arises of immediately exacting reparation by such means as may be appropriate.[9]

Equally good cause for intervention exists

when the foreign government becomes itself a party to important contracts and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time and labor and capital from a reliance upon its own good faith and justice.[10]

As it is the duty of the foreign sovereign to protect resident citizens of other states in all their rights to the extent of the protection afforded by the local municipal law and to extend to them all the rights and remedies which the local courts can grant where questions arise between them and its own citizens or subjects, so is it itself barred from the exercise of any act the effect of which is to deprive them of such redress as its courts have to offer. This rule has perhaps never been stated more clearly or impressively than in the opinion rendered by Sir Henry Strong, one of the arbitrators in *El Triunfo* case. He says:

[9] Hall, Int. Law, 4th ed., Sec. 87, p. 291.
[10] Mr. Cass, Secretary of State, Wharton's Int. Law Dig., Sec. 232, p. 661.

If the Republic of Salvador, a party to the contract which involved the franchise to El Triunfo Company, had just grounds for its complaint that under its organic law the grantees had by misuser or nonuser of the franchise granted, brought upon themselves the penalty of forfeiture of their rights under it, then the course of that government should have been to have itself appealed to the courts against the company, and there by the judicial proceedings, involving notice, full opportunity to be heard, consideration, and solemn judgment, have invoked and secured the remedy sought.

It is abhorrent to the sense of justice to say that one party to a contract, whether such party be a private individual, a monarch, or a government of any kind, may arbitrarily, without hearing and without impartial procedure of any sort, arrogate the right to condemn the other party to the contract, to pass judgment upon him and his acts, and to impose on him the extreme penalty of forfeiture of all his rights under it, including his property and his investment of capital made on the faith of that contract.

The fact that a state occasionally refuses to interfere in such cases is not due to the absence of the right to protect, but to the fact that as a sovereign state it is the sole judge as to whether or not the injuries complained of actually or indirectly, through a reasonable extension of the theory, menace its self-preservation. Futhermore, intervention, or the denial of it, must necessarily be based on a general national policy or a particular policy adopted for the purpose of meeting the requirements of each particular case. This brings us to the consideration of the national policy of the United States with regard to the protection of its citizens abroad.

While it would seem, under the theory of national preservation here advanced, that the United States has the right to protect its citizens abroad in cases of breach of contract by the foreign power this government has almost uniformly refused to intervene at least by the use of means other than that of its good offices;[11] and even the good offices will be refused in cases where it appears that the origin of the debt was a speculative or unneutral transaction.[12] Various grounds justifying the refusal of the government have been expressed

[11] Mr. Fish, Secretary of State, to Mr. Muller, 1871, Moore, Int. Law Dig., Vol. 6, p. 710.

[12] Mr. Seward, Secretary of State, 1868, Moore, *ibid*, 710.

by successive Secretaries of State, but the argument most frequently advanced in support of this policy is that contractual relations entered into by a citizen of this country and a foreign government are the result of the voluntary action of the parties; moreover that a party before entering into a contractual relation with another is presumed to take the character of the other into consideration, and if that character is such as to bring into the transaction a separate element of risk, to voluntarily assume it.[13] Mr. Bayard, when Secretary of State, has gone so far as to assert that by the law of nations there is no redress for contractual claims.[14] It would seem safer, however, to base the refusal of intervention in such cases on an accepted national policy rather than on the absence of right on the part of the state to protect as a matter of international law.[15] That as a matter of national policy the rule of non-intervention in claims purely contractual can be sustained for another reason besides that of voluntary assumption of risk for individual profit on the part of the claimant, namely, that of absence of bad faith on the part of the foreign nation, seems plain. The commission of a tort, the intentional violation of a municipal law by an individual or state conveys irresistibly the idea of a conscious and deliberate wrongful act, which in turn equally irresistibly implies the existence of bad faith as the instigator of the injury. It is otherwise in the case of failure on the part of either state or individual to carry out a contract or even to deliberately withdraw therefrom. Such want

[13] Mr. J. Q. Adams, Secretary of State, 1823, Moore, *ibid*, 708; Mr. Bayard, Secretary of State, 1885, Moore, *ibid*, 716; Mr. Blaine, Secretary of State, 1890, Moore, *ibid*, 717.

[14] Mr. Bayard, Secretary of State, to Mr. Bispham, 1885, Moore, *ibid*, 716. It is evident from the contents of a later dispatch from Mr. Bayard to Mr. Scott of June 23, 1887, cited in Moore, *ibid*, 725, that the claims referred to are purely contractual and based on no injected element of tort.

[15] In view of Lord Palmerston's circular of 1848, addressed to the British representatives in foreign states, to the effect that it is not a question of international right whether or not the British Government should make the claims of British holders of unpaid bonds and public securities of foreign states the subject of diplomatic negotiations, which was reaffirmed by Lord Salisbury as late as 1880, it would seem that Mr. Bayard's contention is open to challenge. (See Hall, *ibid*, Sec. 87, p. 294.)

of action or such withdrawal may be and generally is the result of the failure or supposed failure by the other party to carry out his terms as agreed upon, and gives rise to no fair inference of the existence of that moral turpitude which is characteristic of bad faith.

This reasoning does not, however, apply to cases where, although the transaction leading to the claim originates in contract, the immediate cause of the claim is an act by the foreign government injurious to the contractual interests of the claimant, and not in itself arising in contract. In such cases it is the policy of the United States to intervene, the basis for diplomatic action being generally stated to be the tort committed by the foreign government.

Mr. Bayard, in an instruction issued in 1887, says:

I observe * * * that in part of your note to Dr. Seijas you speak of the case as one of violation of contract, though you subsequently very properly rest the claim on tort. The case is indeed one of violation of contract, but it is not on the contract, for the purpose of obtaining either its fulfilment or damages for its nonfulfilment that this government now proceeds. The case is one of an arbitrary confiscation and spoliation of the rights and property of citizens of the United States * * *"[16]

It appears that this policy is amply justified by the rule of international law which allows intervention where a state violates its own municipal law to the detriment of resident citizens of a sister state; but this country's policy of non-intervention in simple breaches of contract shows that, in such instances at least, it does not avail itself of the right of intervention admitted under that particular rule. Intervention in cases of confiscatory breaches of contract would not seem to be based on the financial loss suffered by the individual, for no matter what the extent of the private loss, if it arises from a simple breach of contract, this country will not generally interfere; nor on the tort in so far as it affects the individual only, for the individual loss actually suffered remains the same irrespective of whether the act that causes it is tortious, or the reverse.

[16] Moore, *ibid*, 725. *Semble*, Mr. Olney, Secretary of State, to Mr. Gana, Chilean Minister, 1895. Moore, *ibid*, p. 729. See also Mr. Cass, Secretary of State, 1858, Moore, *ibid*, p. 723; Mr. Bayard, Secretary of State, 1887, Moore, *ibid*, p. 725.

Relying on Vattel's principle that he who ill-treats a citizen indirectly offends the state,[17] it seems safe to conclude that the true justification of intervention and its proximate cause in such cases is bad faith on the part of the debtor sovereign directed, not towards the citizen, though traced through him, but towards the state.

It may be added in this connection that although it is the coexistence of the tort with the right to protect that is taken as the ground of intervention in the particular case, the right to protect, based as it is on the national right of self-preservation, *may* be exercised in the absence of any indication of bad faith on the part of the foreign state. For it must be remembered that the failure to exercise it in cases arising in contract is due merely to the existence of a given policy, and not to the absence of the right to protect. Where special circumstances demand it[18] the policy must yield to the necessities of the case; in other words, when the national interest demands it, it seems that the right to protect should be exercised on the ground of self-preservation alone, irrespective of good or bad faith on the part of the foreign sovereign.

This paper, necessarily limited though it is, calls for a brief consideration of the policy of this country regarding the protection of the rights of those of its citizens whose interests as members of a foreign corporation are subjected to injury by tortious acts performed by the incorporating state. In two late cases of importance, that of the Delagoa Bay Company (1889), and that of El Triunfo Company (1898), this government decided that the proper

[17] Vattel, Le Droit des Gens, book 2, Chap. 6, Sec. 71.

[18] It is not known whether or not this proposition has ever been directly announced by this government, but the following statement would seem in point: After stating that the United States will intervene to protect its citizens in Nicaragua for injuries resulting from tortious proceedings, Mr. Cass, Secretary of State, in instructions sent to Mr. Lamar in 1858, said: "But there is yet another consideration which calls for the attention of this government. These contracts with their citizens have a national importance. They affect not ordinary interests, merely, but questions of great value, political, commercial and social, and the United States are fully justified by the considerations already adverted to in taking care that they are not wantonly violated, and the safe establishment of an inter-oceanic communication put to hazard, or indefinitely postponed. * * *" (Moore, *ibid*, 723.)

course was diplomatic intervention. There is an inclination to criticise this action, mainly on the ground that as the claimants were stockholders in a foreign corporation they must look to the corporation for redress in the first instance, being themselves possessed of merely equitable rights, and that as the corporation was a foreign citizen the United States were not justified in taking international action, inasmuch as such action, if taken at all, must be taken on behalf of citizens of the United States.[19]

The question presented by such cases, put concretely, would seem to be "Has this government the right to intervene on behalf of those of its citizens who, through a tortious act on the part of a foreign government, are injured in their equitable, though not in their legal, rights under the municipal law?" Inasmuch as the right to protect at all seems based on the right of national self-preservation it follows that, with the limitations hereinbefore set out, the exercise of the right is justifiable whenever it constitutes directly or indirectly an act of self-preservation. Where the limitations imposed by international law or voluntarily assumed as a matter of national policy are no longer binding, it would appear that there are but two things for the state to consider, first, whether there is any specific right to be protected, and, second, whether the protection of that right is necessary, directly or indirectly, as a measure of national self-preservation. Of this necessity the state must, perforce, be its own judge.

It seems that the question of equitable or legal right — creatures par excellence of the municipal law — should have no standing

[19] In the case of the *Antioquia*, cited by El Salvador in El Triunfo case, the following grounds against intervention are stated by Mr. Frelinghuysen, Secretary of State, citing the case of the Banco Nacional del Peru: "* * * that the existing interest of the American shareholders was reduced to an equitable right to their distributive shares of the funds of the corporation; that the rights of the corporation were involved and not the individual rights of the shareholders, and that even if all the individual members of the corporation were duly qualified American citizens they could not present their complaint in their individual names as owners, but must present them as belonging to the corporation as owner." (Moore, *ibid*, p. 646.) This reasoning was characterized by Judge Penfield, then Solicitor for the Department of State, in his report to Secretary Hay, as academic. (Moore, *ibid*, p. 651.)

where matters essentially of international law are concerned. For while the sovereign may and should recognize the distinction between such rights under the local municipal law, such recognition would seem to be necessary only for the purpose of ascertaining whether or not the right the protection of which is under consideration constitutes such a national asset as to justify intervention from the standpoint of national self-preservation. To make intervention depend on the equitable or legal nature of the right to be protected would seem to force upon international law a distinction which it should not admit, and to compel the law of nations to pay homage to the laws of a single nation. As it is the injury to the state and not the injury to the individual which is the true cause and justification of international intervention, it seems unreasonable to contend that the remedies open to sovereigns must be founded on or measured by limitations imposed by municipal law. It seems that equitable rights exist as such under municipal law in default of adequate provision under the legal system for the protection of certain rights which, in justice, demand such protection; that is, that equitable rights are called into existence because the rules of relief provided by the municipal law are inadequate in equity. Does this disability exist with regard to the rules for relief provided by international law? In other words, is there any right of any kind which, within the limitations already set out, the state may *not* protect under the rule that intervention is justifiable when the demandant state is satisfied that the violation or distruction of such a right by the debtor state menaces its self-preservation? The writer has yet to discover an instance of such an exception among the accepted rules of international law. Should such an exception gain a firm foothold in the exercise of our national policy? It would seem not, according to that policy as hitherto pursued and by which this government seems to say to its citizens abroad: "You shall be protected even in rights originating in contract where the violation of those rights is the result of a breach of good faith on the part of a foreign state." International law says: "Protection in all rights." Surely it seems unreasonable that a national policy should create exceptions for which there is no precedent in international law which is the very foundation of the policy.

It would seem that the true answer to the objections to the exercise of intervention in such cases is that by the tortious act of a foreign government a citizen of the United States has been deprived of or injured with respect to a property right; that this right has a financial value which may be great or small; that the fact that the right is legal or equitable has no significance from the point of view of international law, which seems to recognize no such distinction; that the equitable nature of the right does not detract from its value as an asset belonging to the citizen, or prevent it from forming a portion of the totality of the assets of the state; that as such, its existence may or may not be necessary to the preservation of the state, but of that fact the state must be the only judge; and if the sovereign reaches the conclusion that it is so necessary, it is justified in intervening to protect itself through the protection of that particular right.

The following conclusions are the result of the foregoing reasoning:

First, that the convention at The Hague in 1907 respecting the limitation of the employment of force for the recovery of contract debts neither curtails nor denies the right of nations to intervene diplomatically for the enforcement of such debts, but merely makes it a condition precedent on the part of the demandant state to invite arbitration with the debtor state prior to the exercise of the right, if exercised at all; further, that by failure to submit to an award rendered or by preventing an agreement as to a *compromis,* after accepting the offer to arbitrate, the recalcitrant state *may* lay itself open to intervention by the demandant on the ground of breach of national good faith in the premises aside from the grounds of intervention generally recognized as valid in international law, whereas a mere refusal to arbitrate would seem to render the debtor state liable to intervention on the latter grounds.

Second, that the United States has the right, under the accepted principles of international law, to interfere for the protection of its citizens abroad in *all* cases where the foreign sovereign commits or suffers to be committed, an act in violation of its own municipal law, whereby citizens of the United States are injured in person or property, irrespective of whether such injuries are purely contractual in nature, or are the result of a tort.

Third, the United States, under its present national policy, will generally refuse to intervene for the protection of the property rights of its citizens abroad, where such injury arises from a mere breach of contract on the part of the foreign government, and is not characterized by bad faith toward the United States; where, however, such breach is characterized by bad faith, as evidenced by the injection into the transaction of an element of tort, the United States will intervene (in the absence of any conflicting subsidiary policy), the recognized ground of intervention being the tort. Furthermore, intervention in such cases will not, it seems, be refused on the ground that the citizen, protection for whose rights is requested, is a member of a foreign corporation such as a joint stock company or commercial copartnership recognized as a juridical entity by the incorporating state.

The CHAIRMAN. There is now an opportunity for discussion of the papers presented this morning and this afternoon, and I presume also for a discussion upon the general subject of *The Basis of Protection to Citizens Residing Abroad.*

Mr. MARBURG. I would like to express just one thought in connection with this subject which has been discussed, considering the question as naturally falling back upon the conditions of the municipal law, and the phases of the law dealing with this question.

It seems to me that the governing principle by which a debtor is haled into court to meet a certain obligation which he may have to a creditor is expediency, and not justice. The average commercial house takes into consideration its average annual losses and they are charged up as part of the expenses of the business. There is no question of justice in connection with the process of the law against the debtor.

In respect to the use of force in collecting contractual debts of a citizen against a foreign nation, if you will look upon this from the side of expediency there at once arises the tremendous consequences of the use of force. War is no light matter, and the consequences of a single war may many times outweigh the benefits that can be derived from such a process.

Formerly men were thrown into prison for debts, whether they had property with which to discharge that debt or not. It seems to me that just as that custom has been thrown aside, we shall come to this higher position, that the use of force in collecting claims arising out of contracts abroad is a thing which should be relegated to the limbo of things which we have outgrown.

The CHAIRMAN. Is there any further discussion of this subject?

Mr. BOUVÉ. Mr. Chairman: I would like to ask the gentleman who has just spoken, if it is his opinion that an American citizen may be wrongfully ruined by a foreign government, without having any method of redress afforded him. I can not quite understand his point of view. He appears to take the ground that it is wrongful and inexpedient to apply force for the purpose of relieving a man who has been ruined in the way I have just suggested. It may be that I have mistaken his meaning; but I am of the opinion, from what I have heard, that he thinks no relief ought to be given under those circumstances. If he does not mean that, I would like to hear what he has to say with regard to the kind of relief to be given. For example, let us suppose that an offer of arbitration has been made, under the terms of the first article of the Hague Convention of 1907, and the debtor's state simply says that, for reasons best known to herself, she will not arbitrate.

Mr. MARBURG. I take it that Mr. Bouvé refers to contractual debts.

Mr. BOUVÉ. Yes; that is what we were referring to.

Mr. MARBURG. And not to cases of violence?

Mr. BOUVÉ. No; to contractual debts.

Mr. MARBURG. We might say that force, under extreme necessity, would be justified in order to bring up the moral tone of the world. That is the only ground on which, to my mind, such a proceeding can be justified. But my point is that the evils of war are so horrible that they outweigh the benefit that can result from the use of force, and that the nation which breaks its faith with for-

eigners will find the folly of such a course by not being able to borrow, so that it will find it inexpedient to continue that process. Through normal operations the rate of interest to such a nation would gradually be raised.

The point about which Mr. Bouvé particulary inquires is as to the remedy to our citizen whose contract has been violated.

Here I should say that the man who enters into a contract ought to enter into it with full knowledge of the risks. He knows or ought to know, when he deals with such a government, that the chances of repayment are not as good as when he deals with a country like England or Germany. The very difference in the rate of interest indicates that he has that knowledge, and that alone ought to be a safeguard. The results of war are so disastrous that we ought not to resort to it in order to recover the property of a citizen who has taken those chances.

Mr. Bouvé. Mr. Chairman: Why should not the argument of voluntary assumption of risk apply equally to an American citizen who obtains a concession from one of our sister republics, and those concessions are arbitrarily withdrawn? Would the gentleman say that in cases where it is the defined policy of our country to protect by diplomatic intervention, that such protection ought not to be extended?

Mr. Marburg. In reply to that, Mr. Chairman, I have tried to make my position clear, alt ough I may have expressed it awkwardly. I should exclude utterly the use of force in reference to contractual debts.

Mr. Larrinaga (the Delegate from Porto Rico). I wish to say, Mr. Chairman, that I am not a lawyer, and not for a minute would I assume to appear in this discussion of the legal principles; but I want to state to the gentlemen here some facts I have come across. I have always taken a good deal of interest in the work of this Society and I was deeply interested in the discussion of this subject by the two gentlemen who have just spoken.

I thought it was my duty to present to you a few facts. I am an

old man, and I thought it was my duty to present to these gentlemen a few facts that, in the course of my life, I have been able to absorb in my country, Porto Rico, before the American occupation. It is a well-known fact in Porto Rico, Mr. Chairman, that corporations and commercial houses and men doing business, mostly Germans, have always been willing to take the chances of doing business outside of what you call the pale of the law and to make a thriving business for a time, until the deal changes, and then they cling for protection to their own country.

This is a fact that has obtained in my country and that I believe obtains in almost every country, mainly in Central and South America, with which I am more conversant.

This is all I want to present to the Society — that there are many instances I have known of in my own country, where foreigners, mostly Germans, as I have stated, have taken the chances of making a very good business out of some deal which they knew was illegal, and yet when the business failed to be so good then they cling to the protection of their country.

Just now we have before the House of Representatives in Washington a bill to amend our organic act, commonly known as the Foraker Act. In the matter to which that refers, not only Germans, but Americans are involved. There is a provision of the law which forbids them from acquiring more than 500 acres of land. This mostly refers to sugar land. These corporations have gone there and bought, by some means or other, thousands of acres of land. The author of the bill failed to provide any penalty for the breach of that provision of the law.

I do not know whether I express my idea clearly; but in our organic act there is a section hindering any corporation or individual that did not have them already, from acquiring more than 500 acres of land. They have gone there and have bought thousands of acres of land and they have been violating the law. Now they come and appeal to the Committees of the House and are working desperately to have this amendment defeated, so that the present organic act will remain and they will be able to continue their practice without being amenable to any penalty within the law.

Mr. Bouvé. I would just like to say a few words in reply to the gentleman who has spoken of facts, and therefore I will simply answer as to facts. I do not think he can have understood the article that was read to contend that this country would, as a matter of national policy, ever support the claim of a man who has taken what you might call an illegal chance. The State Department will not entertain such cases. What I have said is this: that, as a matter of international law, apart from the question of national policy, this country has the right to interfere in cases where a foreign country has merely broken a contract, and it is its policy to interfere where the breach of the contract is accompanied by a tortious act.

Mr. Lansing. I would like to ask one question which is quite pertinent to this discussion. The Dominion of Canada, or the Province of Quebec, has granted timber leases to American companies for the purpose of cutting wood and shipping the logs from there to be manufactured into wood pulp in America. The Province of Quebec now prohibits the export of those logs, on the theory that they must be manufactured into pulp in Canada. Is that a case where our national policy would be one of intervention or the use of force?

This is not a new question, because we had identically the same question raised some years ago in regard to the shipment of lumber purchased in the Province of Ontario. After the Americans had made the purchases and erected their mills, on the American side, Canada, or the Ontario Government, imposed a tax which practically prohibited the export of logs to the United States, and the result was that millions of dollars involved were lost.

Is it the national policy of the United States, in a case like that, not to intervene or to use force?

I am not saying which side I take in this matter; but I just present it as a question, and one which does not involve nations which are not of the very highest moral sense.

Mr. Clarke. In the case suggested by Mr. Lansing, the alternative is not to use force, as he seems to suggest. To say what the

State Department would do is a problem which it is not for me to answer. But I will say this: in view of the relations between the great nations of America and Great Britain, there will never come a day when there will be a resort to force in such a claim. Unquestionably, under the policy of the Government of the United States, there would be diplomatic interference to the extent of attempting to obtain justice between nations and citizens, and the result of that attempt would be what has happened before between those great nations of high civilization — not war, but a resort to the courts of Canada or to international arbitration, such as is being had to-day in the Fisheries Case.

These questions are partly questions of absolute ethics and partly of relative ethics. On the question of ethics there can be no doubt about the principles laid down in the paper I have just read to this Society; but the question of relative ethics is quite another matter. On the question of relative ethics, each claim must be taken up, in the first place, by the government to which it is presented and weighed with reference to its own justice and honesty.

The particular question submitted by the gentleman from Porto Rico, if presented to the State Department, would never lead to diplomatic intervention, or open rupture.

As expressed in my paper, it would be a most outrageous condition that could result from the enforcement of a theory, if we should go to the extent of claiming that, on a contract, war with England would be justified. As to that I wish to say right here that expediency would veto the absolute ethics of the proposition. In other words, the relative ethics of time, place and circumstance would intervene.

But the case is altogether different where you have the power to enforce the absolute ethics, and where the nation is attempting an act of injustice. There it is right that you should use the power you have, and insist upon enforcing the recognition between natons of the absolute ethics, so far as you have the power to do it.

The Chairman. If there is no further discussion we will proceed to the next order of business, which is the preliminary report of the Committee on Codification.

PRELIMINARY REPORT OF THE COMMITTEE ON CODIFICATION.

Mr. LANSING. Mr. Chairman: I shall not attempt to read the report, as it has been placed in the hands of the members of the Society for their examination, in print.[1] The committee appreciates that their work is entirely tentative, and merely suggestive. It is their desire that every effort should be made by the members interested in this subject to offer suggestions as to any change in plan or as to the scope of the work of the committee. The committee hopes, at a later time, to present the report much more in full. The committee thinks it is the duty of every member of this Society to advance the work, and make it a success.

The committee desires that the President should be empowered to appoint sub-committees to deal with the various preliminary topics outlined, in case this report is received.

As I say, it is purely a tentative report, and therefore cannot be adopted in its present form.

Mr. BUTLER. I move that this report be received and placed on file, that the committee continue its work, and that the President of the Society be authorized to appoint sub-committees on the various subjects, from this committee, or from other members of the Society.

(The motion was seconded and agreed to.)

The CHAIRMAN. I am requested to announce that the Executive Council and Executive Committee meet in this room, immediately after adjournment.

Thereupon, the Society adjourned *sine die*.

ANNUAL BANQUET.

The annual banquet, held in the New Willard Hotel, Washington, D. C., on Saturday evening, April 30, 1910, at seven o'clock, was well attended by members of the Society. Hon. Elihu Root, President of the Society, presided as toastmaster, and informal addresses were delivered by the following members:

[1] Printed, p. 197.

Hon. Charles Nagel, Secretary of Commerce and Labor;

Dr. James B. Angell, president emeritus of the University of Michigan;

Dr. Harry Pratt Judson, president of the University of Chicago;

Prof. Eugene Wambaugh, of Harvard Law School.

MEETING OF THE EXECUTIVE COMMITTEE.

The Executive Committee met at the New Willard Hotel Friday, April 29, 1910, at 11 o'clock a. m.

On motion, duly seconded and agreed to, Prof. George G. Wilson was named to prepare and present to the Society a resolution concerning the deaths of Justice Brewer and Judge Penfield. At the same time the committee expressed the opinion that the record of deaths in the Society should take the form of simple resolutions and that the Society should only officially notice the decease of officers serving at the time of death.

The Committee for the Selection of an Honorary Member reported unanimously the name of Hon. T. M. C. Asser of Holland. The question was raised as to whether the candidate selected be elected to fill the vacancy existing for 1909 or whether he should be elected for 1910. After discussion, the Executive Committee reached the conclusion that it would not be well to leave the honorary membership for 1909 vacant, and accordingly directed that Mr. Asser's name be recommended to fill the vacancy for that year.

It was then suggested that the committee recommend a candidate for election to the honorary membership for 1910, but objection was made that the Executive Council had decided in 1908 that names of candidates should only be considered after having been referred to a select committee. Thereupon, the following motion was made, duly seconded and passed:

That the committee appointed to recommend to the Executive Council an honorary member of the Society shall file its report with the Secretary of the Society at least three weeks previous to the annual meeting; that the report shall state the qualifications

upon which the recommendation of the committee is based, and that the report shall within two weeks be sent to each member of the Executive Council for their consideration.

It was further moved, seconded and agreed that the present committee for the selection of honorary member, consisting of Messrs. Woolsey, Wilson and Ralston, be constituted a standing committee and that any vacancies in the committee shall be filled by the Executive Committee.

The next order of business was the appointment of a Committee on Nominations, on which the following gentlemen were named: Mr. Charles Henry Butler, General George B. Davis, Mr. James F. Colby, Mr. Charles Cheney Hyde and Mr. Walter S. Penfield.

The Treasurer thereupon submitted his report, which was accepted.

In connection with the consideration of the Treasurer's report, some discussion was had as to ways and means of increasing the membership of the Society. As the result of the discussion the following standing committee for increasing the membership was appointed: Mr. James Brown Scott, Chairman; Messrs. Charles Cheney Hyde, John H. Latané, Jesse S. Reeves and Theo. S. Woolsey.

Thereupon, at 12:30 o'clock p. m., the Executive Committee adjourned.

MEETING OF THE EXECUTIVE COUNCIL.

The Executive Council met at the New Willard Hotel, Saturday, April 30, 1910, at 4 o'clock p. m.

The Council re-elected all the officers and members of the Executive Committee, except the Chairman, Mr. Oscar S. Straus, and expressed its regret at Mr. Straus's absence abroad which necessitated the election of a successor. Hon. John W. Foster was elected Chairman of the Executive Committee.

The Chairman of the Executive Committee was authorized to appoint a committee on publication of the proceedings of the Fourth

Annual Meeting and a committee on program for the Fifth Annual Meeting.

Messrs. Everett P. Wheeler and William Dulles were elected a committee to audit and report on the accounts of the Treasurer.

To fill the vacancy made by the resignation of Mr. W. Clayton Carpenter, Mr. George A. Finch was elected Assistant to the Secretaries and Treasurer of the Society and Business Manager of the American Journal of International Law.[1]

The following gentlemen were elected members of the Editorial Board of the American Journal of International Law: Messrs. James Brown Scott, Editor-in-Chief, Chandler P. Anderson, Charles Noble Gregory, Amos F. Hershey, Charles Cheney Hyde, George W. Kirchwey, Robert Lansing, John Bassett Moore, George G. Wilson, Theodore S. Woolsey, George A. Finch, Business Manager.

The Treasurer of the Society was, upon motion duly seconded and passed, authorized to pay such sums as are necessary, on the voucher of the Chairman of the Committee on Codification, for the proper circulation of the preliminary report of the Committee on Codification.

The following resolution was then offered, seconded and agreed to:

Resolved, That in order to make satisfactory arrangements for the meetings of the Society, and to carry out the schedule of meetings and other engagements, the Committee on Program, in sending out invitations to read papers or to speak, shall especially state the time allotted to the paper or the speech, transmitting a copy of this resolution at the time, and that an acceptance of the invitation shall be regarded as an agreement to limit the paper or speech to the time specified; and that no principal paper or speech shall exceed twenty minutes and no secondary paper or speech shall exceed ten minutes; and

Resolved, That the presiding officer of each meeting be charged with the strict enforcement of this rule.

Thereupon, the Executive Council adjourned.

[1] Mr. Finch was provisionally elected at a meeting of the Executive Committee held November 15, 1909, on which date Mr. Carpenter's resignation became effective.

PRELIMINARY REPORT OF THE COMMITTEE OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW ON THE CODIFICATION OF THE PRINCIPLES OF JUSTICE IN TIMES OF PEACE BETWEEN NATIONS, APPOINTED UNDER THE RESOLUTION OF THE SOCIETY OF APRIL 24, 1909.

Resolution adopted at the Meeting of the Codification Committee April 26, 1910.

Resolved, That the reports of the Sub-Committees on Scope and Plan and on the History and Status of Codification be adopted as the tentative report of the full Committee on Codification and referred to the Society at its Fourth Annual Meeting.

ELIHU ROOT, *Chairman.*

JAMES BROWN SCOTT, *Secretary.*

REPORT OF THE SUB-COMMITTEE UPON SCOPE AND PLAN OF THE REPORT.

The Sub-Committee upon the Scope and Plan of the Report of the Committee appointed pursuant to the resolution adopted at the Third Annual Meeting of the American Society of International Law on April 24, 1909, respectfully reports as follows:

SCOPE OF THE REPORT.

The work of codification confided to the committee is limited as to subject-matter and method of treatment by the language of the resolution, by the purposes of such codification as indicated in the preamble to the resolution, and by the reasonable assumption that a comprehensive and systematic treatment is required:

The resolution of April 24, 1909, reads as follows:

WHEREAS, the arbitration of questions of a legal nature between nations is recognized as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle; and

WHEREAS, the establishment of a permanent court of international arbitration is predicated upon principles of justice universally recognized; therefore, be it

Resolved, That the President of the American Society of International Law shall appoint a committee of seven members, of which he shall be *ex officio* the chairman, to report to the annual meeting of the Society in 1911 a draft codification of *those principles of justice, which should govern the intercourse of nations in times of peace;* and make a preliminary report, if possible, in 1910, sufficiently in advance of the meeting to be a subject for discussion at the Fourth Annual Meeting.

LIMITATIONS BY THE RESOLUTION.

I. AS TO SUBJECT-MATTER.

Two definite limitations as to subject-matter are placed upon the work of the committee by the resolution:

(a) in the words, "principles of justice, which should govern the intercourse of nations;" and

(b) in the words, "in times of peace."

a. Principles of justice, etc.

The words, "principles of justice," mean more than the mere conceptions of moral obligations stated in abtract form; in addition to such fundamental conceptions, they mean, in connection with the work assigned to the committee, those manifestations or expressions of moral obligations actually applied, which have been or can be reduced to concrete rules of international conduct.

The words, "which should govern the intercourse of nations," limiting the words "principles of justice," can be more appropriately considered in connection with the limitatons as to Method of Treatment.

b. In times of peace.

The limiting words, "in times of peace," necessitate a determination of the exact meaning of the phrase. The committee should, therefore,

(1) define the word "peace;" and

(2) compare the condition, which the word implies, with the condition implied by the word "war."

For a full comprehension of the relative states of peace and war, it would seem to be advisable for the committee to discuss

(a) the reality of the attributes of independence and equality, which reason and utility assume, in time of peace, every state possesses, and upon which, as bases, are predicated the rules of international conduct; and

(b) the effect of physical force, as exercised in time of war, upon these assumed attributes of a state.

The committee should analyze those intermediate states between peace and war, which possess certain qualities, some of which pertain to peace, and some to war; and it should determine the extent to which coercive physical force may be exerted without destroying a peace existing between two nations.

II. AS TO METHODS OF TREATMENT.

In the phrase "which should govern the intercourse of nations," the word "should" is important as conveying an idea of obligation rather than enforced submission. By its use, however, the committee is given a greater latitude in its work than it would have if the word "shall" was used. Any one of three ways of treatment is, by the use of the word "should," open to the committee:

(A) Assuming, first, that only those principles of justice, which have found expression in rules of international conduct and possess the quality of enacted laws, are to be codified, and, second, that only those rules, which have received the express assent of a state by convention or otherwise are binding upon it, and that all other rules, not having the sanction of express assent are without authority, and, if followed, represent solely a state's sense of obligation, and are, therefore, outside the province of the committee's consideration, the committee's work would be limited to the body of rules actually in force. By adopting this view the codification would represent the present status of international public law in times of peace, as such

law is recognized by those who confine it to the narrowest limits. The result would be of special value for practical use, but it would manifestly require frequent amendment in the future.

(B) Assuming the broader point of view that the principles of justice and all rules of international conduct founded upon them possess from their very nature all the essential qualities of law, and that sanction by assent must be imputed to every civilized state, even though it has failed to give such assent in express terms, the codification would consist of a body of rules, which, in the fullest sense, "should govern [to use the language of the resolution] the intercourse of nations." Such a codification would be, to an extent at least, theoretical and idealistic, furnishing a standard to be attained rather than one already established.

Both of the foregoing ways of treatment offer advantages, one (A) in the practical benefit to be derived from the exact declaration of international rules, to which nations have given express assent, and the other (B) in the presentation of a higher standard of conduct than has as yet obtained in international intercourse, which might serve as a model for the future.

(C) The third way of treatment consists of a union, to a certain degree, of the practical and the ideal. Having declared a principle of justice, which has been generally recognized by civilized states, and the concrete rules flowing from it, which have been sanctioned by conventional or other express assent, a series of suggestions may be set forth as to a wider application of the principle, or proposals as to changes or modifications of the accepted rules so that they will more nearly conform to a strict application of the declared principle.

This method, which is in the nature of a compromise between the two methods previously stated, would retain the benefits of a codification of rules, which would be practical in their use, and also a condification of ideal rules. While the declaration of practice and theory in the same set of rules, when such practice and theory do not entirely harmonize, has a tendency to weaken the authority of each, the advantages to be gained appear to be sufficient to the subcommittee to warrant its adoption.

PRIMARY SOURCES OF INTERNATIONAL OBLIGATIONS.

A consideration should be had and a statement made as to sources of international obligations such as (1) Necessity, (2) Utility, (3) Morality, and (4) Civilized Usage. Such a statement should embody a consideration of (a) the existence of an international code of ethics, (b) the relation of usage to custom, (c) a definition of the term "civilized nation," (d) the relation of self-interest to abstract right in international intercourse, (e) the weight to be given to reciprocal compacts in determining rules of international conduct, and subjects of a similar nature.

RELATIVE VALUE OF AUTHORITIES.

There should also be considered critically and declared the relative value which should be given to authorities relied upon in defining and formulating in terms an abstract principle of justice or a rule of international conduct. Such a consideration and declaration should include, in more or less detail, (1) Custom, (2) Usage, (3) Conventional Provisions, (4) Diplomatic Agreements, (5) Decisions of International Tribunals and Commissions, (6) Writings of Publicists, (7) Diplomatic and other State Papers, (8) Decisions of Municipal Courts, (9) Dicta of Judicial Tribunals, and (10) Municipal Legislation. It would be appropriate also to discuss at some length the proper force and authority to be given to Precedent in the determination of the rules, and its relation to Custom and Usage.

DEFINITIONS.

The importance of the correct definition of words and terms should be stated in its relation to the work of codification, and also in its relation to the interpretation of international agreements and diplomatic correspondence.

SUMMARY.

The report of the committee should be divided into three general parts. *Part One* — An historical review of previous codifications of the rules of international conduct in times of peace; *Part Two* — An

introduction setting forth the limitations to the work of the committee as fixed by the resolution, the method of treatment adopted, the purposes sought, and the consideration of the preliminary subjects necessary to a right understanding of the reported codification; *Part Three* — The codification proper, consisting of statements of the principles of justice applicable in times of peace, and the rules of international conduct based upon such principles, which have been generally sanctioned by civilized nations, the definitions of terms used, the authorities relied upon in formulating such statements, suggestions as to the extension or modification of the principle and of the accepted rules to bring them into more perfect conformity with the principles stated.

Plan of Codification

Being Part Three of the Report of the Committee on Codification.

THE GENERAL SCHEME.

Following the general scope of the work of codification as outlined, the method of treatment would be to let the rules arising from an abstract principle follow the statement of that principle, each rule receiving a full consideration together with all subjects appurtenant to it, which require consideration. The method in the case of each principle would be as follows:

(1) The statement of the abstract principle in as simple and concise language as is possible, avoiding uncertain and ambiguous terms.

(2) The definition of all words and expressions used in the statement which require explanation.

(3) A review of the authorities relied upon in formulating the statement, discussing them in brief or *in extenso* according to the needs of each case.

(4) A consideration of the reasons for formulating the statement as given.

(5) Statements of the rules of international conduct which have been generally accepted, treating each rule separately as follows:

(a) A simple and concise statement of the rule.

(b) The definition of such words and expressions as require explanation.

(c) A review of the authorities relied upon in formulating the statement of the rule, together with such examples of its application as are appropriate.

(d) Proposals as to changes or modifications of the accepted rule.

(e) A restatement of the rule as changed or modified, if modifications are proposed.

(6) Suggestions as to the extension or limitation of the principle stated.

GENERAL SYNOPSIS OF SUBJECTS.

The principles of justice and rules of international conduct, which are to be treated under the scheme proposed, should relate to the subjects which are synopsized in a general way below. Necessarily the inclusion of certain subjects and the division and arrangement is tentative depending more or less, as they do, upon the results reached after a consideration of the scope of the committee's work and a substantial agreement as to that portion of its preliminary report.

PRINCIPLES OF JUSTICE IN TIMES OF PEACE AND THE INTERNATIONAL RIGHTS AND OBLIGATIONS BASED THEREON.

All RIGHTS and OBLIGATIONS, which relate to the intercourse between States, arising from

The *Primary* or *Fundamental Attributes* of Statehood consisting of

1. Existence,
2. Independence,
3. Equality.

The *Secondary* or *Derivative Attributes* of Statehood consisting of

1. Property and Territorial Jurisdiction.
2. Jurisdiction,
3. Diplomatic Intercourse.

I. Primary or Fundamental Attributes of Statehood.

Definition of a State.

1. EXISTENCE
   - (a) *Territorial*
   - (b) *Political*
     - Government
       - Definition
       - Divisions
       - Recognition
   - (c) *New States*
     - Recognition

2. INDEPENDENCE
   - Definition
   - Real and Fictitious Character
   - (a) *Complete*
     - Freedom in internal affairs
     - Constitutional authority of treaty-making power
   - (b) *Partial*
     - Neutralized State
     - Protectorate
     - Colony
     - Sphere of Influence
   - (c) *Intervention*
   - (d) *Non-intervention*

3. EQUALITY
   - Definition
   - Real and Fictitious Character
   - (a) *Primacy*
   - (b) *Sphere of Influence*

II. Secondary or Derivative Attributes of Statehood.

1. property and territorial jurisdiction.

(a) *Territory*

Extent

Original State

Colony

Protectorate

Sphere of Influence

Boundaries

Prescriptive

Conventional

Acquisition

Occupation

following Discovery

following Annexation

Cession

Conquest

Prescription

Exchange

Accretion

(b) *Waters*

High Seas

Freedom

Fisheries

Free-moving

Sedentary

Marginal Seas

Limits

Coasts

Enclosed arms of the Sea

Innocent passage

Visit

Defense

Health

Revenue

Rivers
Boundary
Traversing territory
(c) *Servitudes*
Dominant Rights
Servient Rights
(d) *Embassies, Legations, and Consulates*

2. JURISDICTION { This division includes the Rights and Obligations of a State to Persons and Vessels, and of Persons and Vessels to a State.

(a) *Persons*
Nationals
Native and Naturalized
at home
abroad
in civilized States
in semi-civilized States — Extra-territoriality
in barbarous States — Extra-territoriality
Aliens
Domiciled and Visiting
Private Persons
Public Agents
Fugitives from Justice
Political Offenders
(b) *Vessels*
Of Nationals
Public and Private
On high seas
In foreign territorial waters
Of Aliens
Public and Private
On high seas
In territorial waters
Of Pirates
Of Slave Traders
(c) *Air ships*

3. DIPLOMATIC INTERCOURSE.
  (a) *Agreements*
    Conventional
      Subjects
      Interpretation
      Permanency
    Diplomatic
      Subjects
      Interpretation
      Limitations
  (b) *Controversies*
    Subjects
      Obligations to other States
      Obligations to Aliens
        as to Person
        as to Property
          Natural
          Contractual
    Settlement
      Agreement
      Judicial
        Joint Commission
        Arbitration
          Courts
          Awards
            Acceptance
            Rejection
      Coercion
        Grounds
          Public Wrongs
          Private Wrongs
            to Persons
            to Property
              Natural
              Contractual

Methods
Reprisal
Embargo
Peaceful Blockade

(Signed)
ROBERT LANSING,
CHANDLER P. ANDERSON,
CHARLES HENRY BUTLER,
L. S. ROWE.

WASHINGTON, D. C., April 9, 1910.

REPORT OF SUB-COMMITTEE UPON THE HISTORY AND STATUS OF CODIFICATION.

The codification of international law was, it would seem, first proposed by the arch-priest of codification, Jeremy Bentham, and in comparatively recent years serious attempts have been made by various writers on international law either to codify the law of nations as a whole, or to state in the form of a code those principles which either actually do, or in the opinion of the writer should, constitute an adequate and progressive system of international law.

As in the domain of municipal, so in the field of international law, codification has had its partisans and opponents, and while the opinion of writers is divided on the subject, municipal codes have been laboriously framed and promulgated and a very considerable number of treaties and conventions have either stated or made the law on various branches of the law of nations. The question is no longer in the form of a proposal as in the days of Bentham, nor academic as it might not inaptly be considered in the days of Savigny, who took his stand against codification; it is no longer theoretical, although debated on principle; for the authoritative code of municipal law has made its appearance and the international statute is a forerunner of an international code more or less complete. The question is no longer one of expediency, but rather one of method: how can the codification of international law be undertaken and

executed in such a way as to foster and develop rather than to block or retard the growth of international law which admittedly exists but whose principles lack precision and authoritative statement?

The difficulties in the way of municipal codification exist in an exaggerated form in international law. Custom which is the life of both systems is checked, and the words of the statute bind lawyer and judge alike. Certainty is obtained at the expense of reason, and precision at the cost of flexibility and growth. The custom had been construed and its meaning fixed, the statute has to be interpreted and its meaning ascertained, and the doubt and uncertainty which the statute was to banish or cure hover about it and the proceedings to be taken under it. Whether or not it be advisable to frame and promulgate a municipal code, experience shows that it can be done; and the satisfactory results derived from the continental codes show that codification is not only possible, but successful, if carefully and thoughtfully framed by bodies of experts and practitioners. The legislature promulgates the recommendations of science and practice, and within the jurisdiction of the legislature the code not only has the force of law, but is the source of law as well.

A difficulty unknown to municipal codification meets us on the threshold of international codification; for the code is not the code of one nation, but of all nations if it be true to its definition and purpose. A government may digest its usages and practices and publish the result in the form of a code, but this is either a municipal digest of the law of nations, or the law of nations as understood and interpreted by the government. It has admittedly no extra-territorial effect, but it is undoubtedly valuable if well done and of great interest to other nations as an official statement of the practice of one nation. But even in this case the value of such a code would be very great as clarifying national sentiment upon the great problems of international law and as tending to give consistency to national policy, and at one and the same time familiarizes the public with the problems as stated and the policy as defined. The international code is a law for the nations, not made or prescribed by the one nor the many, but by all and accepted by all. How is such a code to be

framed? If each government should follow the example of the United States and issue a digest of international law we should then have municipal statements of international law, and the digest of common usage and practice would be a digest of law truly international. The existence of such digests would at least supply the codifier with the necessary material for his work. But the question reverts, who is to be the codifier?

When a municipal code has been promulgated it is interpreted by the courts and applied to all controveries properly arising under it and submitted to the courts. Justice is administered by the state and the judgment of the court is executed by the state, with the force necessary to overcome resistance. The supreme power in the state crushes opposition and forces its will upon the inferior. In the family of nations the relation of legal superiority or inferiority does not exist, and its members meet on the plane of legal equality. The code can not be imposed; it must be either framed in common or accepted by the nations, but if accepted and disputes arise concerning its interpretation there is no court of nations to which an appeal can be made and whose decision is binding. A court of nations may well presuppose a law of nations, just as a code naturally or properly requires a court. This question, however, is not necessarily connected with codification, for there is a law of nations, even although it does not exist in codified form, and the objection of the absence of a court would apply with equal force to an international law in whatever form it may be.

Another difficulty in the way of a code, which does not exist in a single nation, is the matter of language. It is generally true that the citizens or subjects of a particular nation have a common language, but if various languages are spoken within its bounds there is no difficulty in promulgating the laws in the languages of the country in question. A reference to Switzerland and Belgium suffices to show that there is no inherent difficulty in this phase of the subject. It is supposed, however, that nations could not easily agree upon one language, and if they did that the translation into the mother tongue would tend to modify the code. The difficulty is, however, more apparent than real; for if nations really want a

common code, it is as easy to agree upon an authoritative text in a foreign language as it is to agree that the text of a treaty or a convention in a foreign language shall be considered as the original, and that in cases of doubt or uncertainty resort shall be had to the original text. Such is the custom in the matter of the Hague Conventions, and the Hague Conferences show that nations may meet and transact their business in a foreign language if the desire to do so be present. It is equally obvious that the objection based upon language is of a minor nature and in no sense of the word insuperable.

In the foregoing remarks, it has been stated that the objections made to the codification of municipal law may likewise be made, and in fact have been made to the codification of international law, and it has been suggested that the opponents of the one are naturally to be expected to be opponents of the other. It does not follow, however, that partisans of municipal codification are likewise or necessarily partisans of international codification; because many of the advocates of municipal codification believe that the law of nations has not grown sufficiently to be reduced to definite and precise form, which tends to prevent or check growth, and that codification would be premature, and, therefore, injurious. If codification gives precision and clearness, then codification would be a benefit, and if the codification be subject to revision and modification, it is difficult to yield to the objection, although admitting its force. The Geneva Convention of 1864 concerning land warfare was revised in 1906, in the light and practice and experience, and the Hague Convention of 1899, extending to maritime warfare the benefits of the Geneva Convention of 1864, was itself revised at the Second Hague Conference in 1907. Again, the conventions for the pacific settlement of international disputes, and the usages and customs of land warfare of the First Hague Conference of 1899 were revised and improved by the Second Hague Conference of 1907. No objection was made to their revision, and some of the conventions of the Second Conference provide expressly for subsequent revision. The fear, therefore, that an international instrument prevents change and growth would seem to be negatived by the facts. It may perhaps be

said that the conventions referred to were in the nature of statutes creating new law rather than codification of existing law. This is in part true, but does not affect the question, for the statute as a whole, whether it created or codified law, was revised, and, therefore, can not be said to have stood in the way of progress.

But to return to the question. The partisan of municipal codification may object to the codification of the law of nations by reason of difficulties not present in the municipal but unfortunately existing in the international problem. The state may prescribe a code for all persons within its jurisdiction, and so may the states. The difficulty is greater in the latter than in the former case, but the difficulty does not change the nature of the problem. The difficulty is one of degree, not of kind. That nations may codify international law is evidenced by the fact that they have repeatedly done so, beginning with the much-abused Congress of Vienna down to and through the Hague Conferences of 1899 and 1907, and the London Naval Conference of 1908–9. It is true that they have not as yet undertaken the codification of international law as a whole; but their deliberate codifications cover a very wide field, as even a cursory examination of the proceedings of the two Hague Conferences amply suffices to show. The codification of the usages and customs of land warfare and the convention respecting the rights and duties of neutral powers in maritime war, to mention but two instances, deal with delicate and important questions, and cover a wide field. The successful codification of the principles of law within these two broad fields is a demonstration of the possibility of codification, at least within limits, and the action of succeeding conferences will doubtless codify the most important and pressing branches of international law, directly affecting the foreign intercourse of nations, so that codification will be the rule and noncodification the exception. Experience will improve the original text and keep it abreast of international needs. The difficulty of adapting these various conventions into a code, giving to each its appropriate place in the chapter and section of the code is not insuperable. Each international convention is not only a step towards ultimate codification, but the material whereof the code will be composed.

The next difficulty mentioned, namely, the absence of a court of nations, is not likely to furnish the opponents of codification with an argument for any great length of time; for the Second Hague Conference created an International Court of Prize for the judicial settlement of controversies arising out of the unlawful capture and condemnation of neutral property, and its institution within the course of the present year will provide a court for the interpretation and application of the international law applicable to questions of naval warfare.

The draft convention for the establishment of a Court of Arbitral Justice, adopted by the Conference and recommended for constitution through diplomatic channels, will no doubt be instituted at The Hague at no distant date for the judicial determination of all controversies of a judicial nature arising between nations in times of peace. The world will thus have an international judiciary, permanently composed and in session, for the interpretation and application of international law. It is true that these tribunals will lack a physical sanction, but this is due to the fact that international law as such lacks a physical sanction. The difficulty exists without a code, and the difficulty would be not greater but less if the law to be interpreted or administered existed in codified form.

It is evident, therefore, that the difficulties in the way of the codification of international law arise from the nature of international law, and seem to be in no way connected with codification as such. If the nations really wish a code of international law, the Hague Conference can meet the desire, or if the nations prefer a tentative codification of select titles of the subject, the Conference will likewise meet their desires. In the meantime, the carefully devised codifications of international law prepared by publicists and jurists of experience and authority, and the various partial codifications of the law of nations undertaken by learned private associations and societies, such as the Institute of International Law, the Association for the Reform of International Law, and the various national societies, such as the American Society of International Law, will point the way to ultimate codification, and furnish samples of codification on a large or small scale, which may be of considerable service to international legislators.

Passing now from generalities to a consideration of what has actually been done in the way of codification, it appears, as stated in the introduction, that the first proposal to frame a code of international law is due to Jeremy Bentham who, in 1787, gave the law of nations its present name of international law. The influence of this remarkable man has been confined neither to his own country nor to municipal law. His partisanship for codification may well seem a mania, and his proposals made at various times, to autocrat or president, to Mohammedan and Christian, to countries of the old as well as the new world, to furnish them with codes may well cause a smile in those who believe that law is an organic growth, arising from and meeting the needs of the people, and therefore incapable of being imposed from above or from without. But the fact is that whether or not Europe was influenced by Bentham, the new world has been Benthamized. In a passage from Gervinus, quoted by Monsieur Nys, it is said: "All the constitutions, all the laws of the new republics showed traces of Bentham's influence; all the addresses delivered in the various congresses prove that the orators were familiar with his works, of which, according to a calculation made by the firm of Bossange in 1830, thirty thousand copies had been sold in French translations." [1] Not only did Bentham give to the law of nations its present name; he dreamed of a court of nations, wrote an essay on Perpetual Peace, and proposed the codification of the law of nations.

At various times during his long and useful life, Bentham discussed the subject of international codification. First, it would seem, in an essay dealing with the objects of international law, written between 1786 and 1789 (first published in full by Bowring in 1843), and some forty years later, in 1827, he appears to have sketched the basis or preamble of an international code. Almost midway between these two dates, Dumont, the faithful disciple and translator, made known the master's views to the French reading public in chapter 23 of the "*Traités de Législation Civile et Pénale,*" published in 1802.

[1] Nys: Le Droit International, Vol. 1, p. 169.

The importance of Bentham in the movement for the codification of international law justifies a brief consideration of each of these projects.

In the first essay of 1786, entitled "Objects of International Law," [2] Bentham says, in speaking of universal international codes:

"If a citizen of the world had to prepare a universal international code what would he propose to himself as his object? It would be the common and equal utility of all nations: this would be his inclination and his duty. Would or would not the duty of a particular legislator, acting for one particular nation, be the same with that of the citizen of the world?"

To the question thus put Bentham replies in the affirmative:

"If, in conclusion, the line of common utility once drawn, this would be the direction toward which the conduct of all nations would tend — in which their common efforts would find least resistance — in which they would operate with the greatest force — and in which the equilibrium, once established, would be maintained with the least difficulty." Having accepted the principles of utility for nations, Bentham declares the objects of international law as follows:

"1. Utility general, in so far as it consists in doing no injury to other nations, saving the regard which is proper to its own well being.

"2. Utility general in so far as it consists in doing the greatest possible good to other nations saving the regard which is proper to its own well being.

"3. Utility general in so far as it consists in not receiving any injury from other nations, saving the regard due to the well being of these same nations.

"4. Utility general in so far as it consists in such state receiving the greatest possible benefit from all other nations, saving the regard due to the well being of these nations.

"5. In case of wars make such arrangements that the least possible evil may be produced consistent with the acquisition of the good which is sought for."

In framing an international code the codifier should proceed as if he were drawing up a municipal code.

[2] Works, edited by Bowring, Vol. III, pp. 537–540.

"A disinterested legislator upon international law would seek to promote the greatest happiness of all nations generally, by following the same course he would follow in regard to internal law. He would endeavor to prevent positive international offenses, to encourage the practice of positively useful action. He would regard as a positive crime every proceeding by which the given nation should do more injury to foreign nations, collectively, whose interests might be affected, than it should do good to itself. For example, the closing against other nations the seas and rivers which are the highways of the globe. In the same manner he would regard as a negative offense every determination by which the given nation should refuse to render positive services to a foreign nation when the rendering of them would produce more good to such foreign nation than it would produce evil to itself. For example, it having in its own power offenders against the laws of the foreign nation, it should neglect to do what depends upon it to bring them to justice.

"War is a species of procedure by which one nation endeavors to enforce its rights at the expense of another. It is the only method to which recourse can be had, when no other means of satisfaction can be found by complainants, having no arbitrators between them sufficiently strong, absolutely to take from them all hope of successful resistance. But if internal procedure be attended by painful ills, international procedure is attended by ills infinitely more painful — in certain respects, in point of intensity, commonly in point of duration, and always in point of extent.

"The laws of peace would therefore be the substantive laws of the international code: the laws of war would be the adjective laws of the same code."

Bentham regarded peace as normal, war as abnormal; and his chief desire, as evidenced in the essays on the principles of international law, is to devise means for the preservation of peace as well as means for the prevention of war. To prevent war, which he considers an unmitigated evil, he suggests:

"1. Homologation of unwritten laws which are considered as established by custom.

"2. New conventions — new international laws made upon all

points which remain unascertained; that is to say, upon the greater number of points in which the interests of two states are capable of collision.

"3. Perfecting the style of the laws of all kinds, whether internal or international. How many wars have there been which have had for their principal or even their only cause, no more noble origin than the negligence or inability of a lawyer or a geometrician!"

A code, as here outlined, would indeed be elaborate, for it is not only to contain the unwritten laws established by custom, that is to say, to be a codification of existing law, but it is to include provisions on all points which remain unsettled, that is to say, a codification of the entire field of international law.

The project of 1827 is very interesting, and shows that Bentham had in mind a code to be drafted by the states and adopted by them. For, in the first article, he says: "The political states concerned in the establishment of the present all-comprehensive international code are those which follow:

"Here enumerate them in alphabetical order to avoid the assumption of superiority from precedence in the order of enumeration."

The code was to be framed by a congress in which each civilized, that is to say, Christian, state should be represented by a delegate. The text of this document is attached to this report as Appendix A.

The complete English text of the plan for an international code was, as previously stated, first published in 1843, and the full details of the later project of 1827 were only recently made known by Monsieur Nys in an article in *The Law Quarterly Review* for 1885, Vol. XI., pages 226–231.

Bentham's plan for an international code was, however, as previously stated, made public in 1802 by his friend and fellow-worker Dumont in the "*Traités de Législation Civile et Pénale,*" Chapter 23, pages 328–331. The international code, as here outlined, was to be a collection of the duties and rights of the sovereign towards every other sovereign. The code itself was to be divided into a universal code and particular codes. The first was to contain all the duties of the sovereign imposed upon himself, and all the rights

which he should possess in his relations with the other sovereigns. The special code for each state should contain a recognition of the rights and duties possessed by this state, whether based upon express conventions or reasons of reciprocal utility. The universal code should be composed of concessions and demands. The duties and the rights among sovereigns are considered as moral duties and rights, for, he says, we can hardly expect to see between all nations of the world universal conventions and tribunals of national justice.

Bentham then passes to the consideration of the laws composing the particular code, which are of two kinds: executed and executory. In the second division, he places the laws of peace and war which regulate the conduct of the sovereign and his subjects in times of peace or of war, and in the codification of these laws, the method employed for municipal codification is to be applied. For fuller details, see Appendix B for the plan of an international code as briefly sketched by Dumont in the treatise already cited.

The French Revolution has given the world a Declaration of the Rights of Man. But as man, however, did not live in a state of isolation, but in society, it was proposed to complete the first declaration by a second, entitled the Declaration of the Law of Nations. On June 18, 1793, Abbé Grégoire presented to the French Assembly a declaration consisting of twenty-one articles, but they failed to meet approval.[3]

Some two years later, the Abbé reintroduced them with the same result.[4] They created discussion within and without the chamber and are considered as a first tentative codification of international law. Monsieur Rivier says that the declaration "was not a code, but the rudiment of codification, proclaiming a small number of general and absolute principles. * * * On the whole, this project does honor to its author, who was not a jurist; it contains several just maxims and undoubted truths, borrowed from Vattel."[5] This code, interesting in itself, has a special interest as the first attempt

[3] Nys: Etudes de Droit International et de Droit Politique, pp. 394–396.
[4] Nys: Etudes de Droit International et de Droit Politique, pp. 403–406.
[5] Rivier: Principes de Droit des Gens, Vol. 1, p. 40.

to codify the law of nations.[6] It is, therefore, annexed as Appendix C to this report.

It would appear, therefore, that towards the end of the eighteenth century a philosopher, Jeremy Bentham, and a philanthropist, the good abbé and revolutionary bishop Grégoire, proposed the codification of international law; but the proposal neither produced any material nor sensible effect at the time. The codification of municipal law occupied public attention, and publicists and jurists either sided with Thibaut for codification or with Savigny against it. It may be said, however, in passing, that Savigny's objections to codification apply specifically to the attempted imposition of a general municipal code, composed of foreign elements, upon any particular nation, because national law must be the outgrowth of the national conscience. It is obvious that these objections have no proper application to international law by reason of its international or world origin. It is a fact, however, that his arguments are constantly used as if they were directed against international codification.

It was not until 1858 and 1862 that the subject of the codification of international law was discussed in legal circles, when the Russian jurist Katchenovsky read before the Juridical Society his two papers on the situation of international law, and proposed in his second paper its codification by the jurists of all countries acting in common.[7] A few years later, Mr. David Dudley Field forsook the field of municipal law and proposed at the meeting of the British Association for the Promotion of Social Science, held in Manchester in 1866, "the appointment of a committee to prepare and report to the association the Outlines of an International Code, with the view of having a complete code formed, after careful revision and amendment, and then presented to the attention of the governments, in the hope of its receiving, at some time, their sanction." A committee was appointed, consisting of jurists of different nations,

[6] As evidence of the influence of Abbé Grégoire's proposed Declaration, see the preface to G. F. de Martens' Einleitung in das positive europäische Völkerrecht (1796).

[7] Papers read before the Juridical Society, 1858, 1862, pp. 101 *et seq.*; pp. 555 *et seq.*

but, as was to be expected, they did nothing, and the "Outlines of an International Code," published in 1872, and revised in 1876, was the sole work of Mr. Field.

But in the meantime, an event happened which marks an epoch in the history of codification. The war between the States broke out in 1861, and the need was felt for instructions for the conduct of armies in the field. President Lincoln appointed a commission, which intrusted Professor Francis Lieber, of Columbia College, with their preparation. These instructions were approved by the commission and published as General Orders No. 100, and constitute in fact the first codification of the laws and customs of war.

"The Instructions for the Government of Armies of the United States in the Field" have not merely profoundly influenced the governments of other countries, but they formed the basis of the deliberations of the Conference of Brussels in 1874, and influenced indirectly the Hague Conferences of 1899 and 1907.

They have not only shown the advantage of national codification and of international codification of the laws of war, but they called into being the first successful attempt of general codification. Bluntschli states that he was moved to write his treatise on international law in the form of a code (1868) as a result of Lieber's Instructions, and it may thus be fairly said that Lieber's Manual is thus the starting point of the modern movement in favor of the codification of the Law of Nations.

It is, however, true that before the appearance of Bluntschli's codification in 1868 several attempts had been made to codify international law, but it cannot be said that they created sentiment in favor of codification. They did not forward the movement, and have but an historical interest.

In point of time, the first attempt seems to have been made, according to Monsieur Rivier, by Esteban de Ferrater, who published at Barcelona, in 1846–7, a work entitled *Codigo de Derecho Internacional,* "a two-volume, methodical collection of Spanish treaties with a short survey of international law, including the conflict of laws." [8]

[8] Rivier in Von Holtzendorff's Handbuch des Völkerrechts, Vol. 1, p. 514.

The *Saggio di Codificazione del diritto Internazionale,* of Agosto Paroldo, an Italian author, appeared in 1851, and is generally, though erroneously, considered as the first specimen of codification. It deals, however, chiefly with the conflict of laws, and only incidentally with international law, properly so called. (Rights of diplomatic agents, consuls and commercial agents in Titles IX, X.)[9]

The first attempted codification worthy of the subject and of very considerable value is the *Précis d'un Code du Droit International,* published in 1861, by a young Austrian jurist, Alphonse de Domin-Petrushevecz. Neither the Spanish nor the Italian writer dealt with international law as such, and Rivier, particularly learned in the history of international law, considers Domin's *Précis* as the first in point of time as in value. The book, of which a copy is in the Library of Congress, consists of but 133 pages and 236 articles. Domin codifies international law (Articles 1–75), which he divides into peace and war, and conflict of laws (176–236). The codification is preceded by an introduction (pp. 5–22) in which the author explains his method. Where a general principle was recognized by several states he adopted it in the form in which it was generally expressed; where treaties were lacking, he looked to the publicists and took the opinion of the majority. In the matter of maritime law he followed his own judgment. The articles are accompanied neither by authorities, notes nor explanations of any kind.

It is not the purpose of the present report to discuss the well-known codifications of Bluntschli (1868), Field (1872, 1876), or Fiore (1890, 4th edition, 1909), which are familiar to students of international law. They show that the law of nations is susceptible of clear and precise statement, and may be made to assume the form of a code without great difficulty. The works of Bluntschli and Fiore are really treatises on international law, and the articles expressing the views of their authors as to what the law either is or should be are followed by notes, references and discussions. Mr. Field's work preserves the character of a code; the articles are clear

[9] For an analysis and criticism of this work, see Bulmerincq's Praxis, Theorie und Codification des Völkerrechts, pp. 180–181.

and expressed in legal language; the comments upon the articles show their origin, the authorities by which they are supported, and the reason for their existence. The code, which has been translated into French and Italian, is highly regarded on the Continent. An excellent example of private codification of a particular branch of international law is furnished by Professor Holland's Laws of War on Land (written and unwritten), published in 1908.

From this brief sketch it is apparent that the movement for codification of international law, although of recent origin, has made very considerable progress, and that there are not wanting admirable specimens of its successful execution by private persons, such as Bluntschli, Field and Fiore. The Institute of International Law, established in 1873 at Ghent, has furnished the most careful and scientific specimens of codification, covering many of the most important branches of international law. The first article of the statutes of the institute promises its support "to every serious attempt of gradual and progressive codification of international law." From its many admirable specimens of codification, the following may be mentioned as showing the wide range of its activity: The draft code of the law of war on land; a project for arbitral procedure long before the first Hague Conference met; a project on the law, the jurisdiction, and procedure in the matter of prizes; another upon the navigation of international rivers; a declaration of the international duty of neutral states; pacific blockade; occupation of territories; the expulsion of foreigners; the extent of jurisdiction in coastal waters; the bombardment of undefended ports, harbors, towns, etc.

It has been stated that the codification of international law is not confined to publicists, jurists and learned societies, but that the nations in conference have set themselves seriously to the task of giving statutory force to usage and custom, and have in the First and Second Hague Conferences dealt with many of the most important and fundamental questions of international law. Codification seems to be the order of the day, and it is probably safe to predict that in the course of a few years international treaties and conventions will have codified a large portion of international law,

even although no official and authoritative code be drawn up and promulgated by the nations.

(Signed)

JAMES BROWN SCOTT.
CHARLES NOBLE GREGORY.
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WASHINGTON, D. C., April 26, 1910.

APPENDIX A.

BENTHAM'S PROPOSED CODE OF 1827.

Art. 1. The political states concerned in the establishment of the present all-comprehensive international code are those which follow. Here enumerate them in alphabetical order to avoid the assumption of superiority from precedence in the order of enumeration.

Art. 2. The equality of all is hereby recognized by all.

Art. 3. Each has its own form of government; each respects the form of government of every other.

Art. 4. Each has its own opinions and enactments on the subject of religion; each respects that of every other.

Art. 5. Each has its own manners, customs and opinions; each respects the manners, customs and opinions of every other.

Art. 6. This confederation, with the Code of International Law approved, adopted and sanctioned by it, has for its object, or say ends in view, the preservation, not only of peace (in the sense in which by peace is meant absence of war), but of mutual good-will and consequent mutual good offices between all the several members of this confederation.

Art. 7. The means by which it aims at the attainment of this so desirable end — and the effectuation of this universally desirable purpose — is the adjustment and pre-appointed definition of all rights and obligations that present themselves as liable and likely to come into question; to do this at a time when no state having any interest in the question more than any other has, the several

points may be adjusted by common consent of all, without any such feeling as that of disappointment, humiliation or sacrifice on the part of any; adjusted at a time when no detriment to self-regarding interest, on the part of any having or by the part of any supposed to have place, no such cause of anti-social affection will have place in any of the breasts concerned.

Art. 8. Of each of these several confederating states the government can do no otherwise than desire to be regarded as persuaded that its own form of government is in its nature in a higher degree than any other, conducive to the greatest happiness of the whole number of the members of the community of which it is the government; and by this declaration it means not to contest the fitness of any other for governing in the community in which it bears rule.

APPENDIX B.

PLAN OF THE INTERNATIONAL CODE.

Contained in Bentham's
Traités de Législation Civile et Pénale.
Vol. I., Chap. XXIII., pages 328–331.

As Translated by Dumont.

Le Code international seroit le recueil des devoirs et des droits du Souverain envers chaque autre Souverain.

Il peut se diviser en Code universel et en Codes particuliers.

Le premier embrasseroit tous les devoirs que le Souverain se seroit imposés, tous les droits qu'il se seroit attribués à l'égard de tous les autres sans distinction. Il y auroit un Code particulier pour chaque État, envers lequel, soit en vertu de conventions expresses, soit pour des raisons d'utilité réciproque, il se reconnoît des devoirs et des droits qui n'ont pas lieu à l'égard des autres États.

Le Code universel contiendra d'une part des concessions, d'autre part des demandes. Ordinairement la réciprocité aura lieu.

Ces devoirs et ces droits entre Souverains ne sont proprement que des devoirs et des droits *moraux:* car on ne peut guère expérer de

voir entre toutes les Nations du monde, des conventions universelles et des Tribunaux de Justice nationale.

Division des lois qui composent un Code particulier:

1. Lois exécutées — lois à exécuter. Les premières sont celles qui regardent les deux Souverains dans leur qualité de Législateurs respectifs, lorsqu'en vertu de leurs conventions réciproques, il font dans le recueil des lois internes, des dispositions qui y sont conformes. Tel Souverain s'engage à empêcher ses sujets de naviguer dans certains parages: il faut donc qu'il fasse un changement dans les lois internes pour défendre cette navigation.

Les lois à exécuter sont: 1°. Celles qu'on accomplit en s'abstenant simplement d'établir telle ou telle loi interne. 2°. Celles qu'on accomplit en exerçant ou en s'abstenant d'exercer une certaine branche du pouvoir souverain; par exemple, d'envoyer ou de s'abstenir d'envoyer des secours de troupes ou d'argent à telle autre Puissance étrangère. 3°. Celles dont l'accomplissement ne regarde que la conduite personnelle du Souverain donne: par exemple, celles par où il s'oblige de se servir ou de ne pas se servir de tel ou tel formulaire en s'adressant au Souverain étranger.

Second division. Lois de paix — lois de guerre — celles qui reglent la conduite du Souverain et de ses Sujets en temps de paix ou de guerre, à l'égard du Souverain étranger et de ses Sujets.

La même distribution qu'on a suivie pour les lois internes, soit pénales, soit civiles, peut guider pour l'arrangement des lois entre les Nations.

Dans le civil, par exemple, les démarcations de droits de propriété pour des immeubles, peuvent être les mêmes. Il y a des propriétés qui appartiennent en commun aux Sujets du Souverain donné. Il peut y en avoir qui appartiennent en commun au Souverain donné et à tel Souverain étranger, comme les mers, les grands fleuves, etc. Ainsi la République de Hollande avait acquis une espèce de *servitude négative* à la charge de l'Autriche sur le port d'Anvers. Ainsi, par la paix d'Utrecht, l'Angleterre en avoit acquis une autre à l'égard du porte de Dunkerque. Le droit de faire marcher des troupes à travers le pays d'un Souverain étranger est une espèce de *servitude positive.*

La guerre peut se considérer comme une espèce de procédure, par laquelle on cherche de part et d'autre à se mettre en possession des avantages qu'on s'est respectivement adjugés. C'est un exploit par lequel on fait exécuter tout un peuple. Le Souverain attaquant, c'est le demandeur: le Souverain attaqué, c'est le défendeur. Celui qui soutient une guerre offensive et défensive, resemble à un particulier qui, engagé dans un procès réciproque, soutient en même temps les deux rôles contraires. Ce parallèle n'est d'aucun secours pour la forme ou l'arrangement des lois, mais on peut en tirer parti pour introduire des principes d'humanité qui adouciroient les maux de la guerre.

Quand deux Souverains sont en guerre, l'état de leurs sujets change respectivement: d'étrangers amis, ils deviennent étrangers ennemis. Cette partie du Droit des gens rentre dans le plan des Codes particuliers où les Souverains ont pu stipuler des clauses relatives à ce changement.

APPENDIX C.

ABBÉ GRÉGOIRE'S DECLARATION OF THE LAW OF NATIONS.

1. The nations are among themselves in the state of nature, they have for bond universal morality.

2. The nations are respectively independent and sovereign whatever may be the number of inhabitants composing them and the extent of the territory which they occupy.

3. A nation should act towards others as it wishes others to act towards it; what a man owes to a man, a nation owes to another nation.

4. Nations should do in peace the greatest amount of good to each other, and in war the least harm possible.

5. The private interest of one nation is subordinated to the general interest of the human family.

6. Each nation has the right to organize and to change the forms of its government.

7. A nation has not the right to meddle in the government of the others.

8. The only governments in conformity with the rights of the people are those based upon equality and liberty.

9. Whatever may be used innocently and without exhausting it, as the sea, belongs to all, and can not be the property of any nation.

10. Every nation is owner of its own territory.

11. Immemorial possession creates the right of prescription between nations.

12. A nation has the right of entrance to its territory, and to exclude foreigners when its safety requires it.

13. Foreigners are subject to the laws of the country and punishable by them.

14. Banishment for crime is an indirect violation of foreign territory.

15. An attack upon the liberty of a nation is an attack upon all others.

16. Leagues having for their object offensive war, treaties or alliances which may injure the interest of a country are an attack against the human family.

17. A nation can undertake war to defend its sovereignty, its liberty, its property.

18. Nations at war should allow free course to negotiations calculated to bring about peace.

19. Public agents which the nations send to each other are independent of the laws of the country to which they are sent, in everything pertaining to their mission.

20. There is no precedence between public agents of nations.

21. Treaties between nations are sacred and inviolable.

Pages 229-252 deleted - List of Members.